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REPORTS.

(The Supreme Court.)

II] JULY [1960

SUPREME COURT OF INDIA.

[Original Jurisdiction].

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM, J. L. KAPUR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Hamdard Dawakhana and others .. *Petitioners**

v.

The Union of India and others .. *Respondents*:

India Unani Tibbi Conference (In Petition No. 81 of 1959) .. *Intervener.*

Drugs and Magic Remedies (Objectionable Advertisement) Act (XXI of 1954)*—Scope—Constitutionality—If violates fundamental rights under Article* 19 (1) (a), (f) *and* (g) *of the Constitution of India* (1950)*—Section* 3 (d) *and section* 8—Ultra vires—*Articles* 21 *and* 31 *of the Constitution of India* (1950)*—Effect.*

When an enactment is impugned on the ground that it is *ultra vires* and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole, to its objects, purpose and true intention and to the scope and effect of its provisions or what they are directed against and what they aim at. Thus examined it cannot be said that the object of the Drugs and Magic Remedies (Objectionable Advertisement) Act (XXI of 1954) was merely to put a curb on advertisements which offend against decency or morality but the object truly and properly understood is to prevent self-medication or treatment by prohibiting instruments which may be used to advocate the same or which tend to spread the evil. No doubt in section 3 of the Act diseases are expressly mentioned which have relation to sex and disorders peculiar to women but taken as a whole it cannot be said that the object of the Act was to deal only with matters which relate to indecency or immorality.

It cannot be said that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19 (1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not propagating of ideas ; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall under Article 19 (1) (*a*). The main purpose and true intent and aim, object and scope of the impugned Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. This cannot be said to be an abridgement of the petitioners' right of free speech. It cannot be said that the restrictions are either excessive or disproportionate or are not in the interest of the general public.

The words " or any other disease or condition which may be specified in the Rules made under this Act " in clause (*d*) of section 3 of the Act are delegated legislation and do not lay down any certain criterion or proper standards, and surrender unguided and uncanalised power to the executive to add to diseases in the Schedule. This must be held to be going beyond permissible boundaries of valid

* Petitions Nos. 81, 62, 63 and 3 of 1959. 18th December, 1959.

delegation. As a consequence the Schedule in the Rules must be struck down. But that would not affect such conditions and diseases which properly fall within the four clauses of section 3 excluding the portion of clause (*d*) which has been declared to be unconstitutional.

The first part of section 8 of the Act dealing with seizure and detention of any document or article which in the opinion of the person authorised to seize contains any advertisement contravening any of the provisions of the Act, goes far beyond the purpose for which the Act was enacted and the absence of the safeguards which the Legislature has thought it necessary and expedient in other statutes, *e.g.*, the Indian Drugs Act, is an unreasonable restriction on the fundamental rights of the petitioners and therefore the first portion of the section, *i.e.*, "any person authorised by any of the provisions of this Act" is unconstitutional. If the portion is excised from the section the remaining portion is not even intelligible and cannot be upheld. The whole section must therefore be struck down.

As the provisions declared unconstitutional are severable from the rest of the Act the operation of the remaining portion of the Act remains unimpaired.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Dr. K. M. Munshi and *N. C. Chatterjee*, Senior Advocates (*L. R. Das Gupta, G. K. Munshi, D. N. Mukherjee* and *R. Gopalakrishnan*, Advocates, with them), for petitioners.

C. K. Daphtary, Solicitor-General of India and *H. N. Sanyal*, Additional Solicitor-General of India (*B. R. L. Iyengar, R. H. Dhebar* and *T. M. Sen*, Advocates, with them) for Respondents Nos. 1 to 10.

G. N. Dikshit and *C. P. Lal*, Advocates for Respondent No. 11.

R. Gopalakrishnan, Advocate, for the Intervener.

The Judgment of the Court was delivered by

Kapur, J.—These petitions under Article 32 of the Constitution raise the question of the constitutionality of the Drug and Magic Remedies (Objectionable Advertisement) Act (Act XXI of 1954) hereinafter referred to as the Act. As the petitions raise a common question of law they may conveniently be disposed of by one judgment.

The allegation of the petitioners was that various actions had been taken against them by the respondents which violated their fundamental rights under Article 19 (1) (*a*) and 19 (1) (*f*) and (*g*). They also challenged the Act because it contravened the provisions of Article 14 and Articles 21 and 31.

The Act passed on April 30, 1954, came into force on April, 1, 1955, along with the Rules made thereunder. As provided in its Preamble it was

"An Act to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith".

The petitioners in Writ Petition No. 81 of 1959, the Hamdard Dawakhana (wakf) and another, alleged that soon after the Act came into force they experienced difficulty in the matter of publicity for their products and various objections were raised by the authorities in regard to their advertisements. On December 4, 1958, the Drugs Controller, Delhi, intimated to the petitioners that the provisions of section 3 of the Act had been contravened by them and called upon them to recall their products sent to Bombay and other States. As a result of this, correspondence ensued between the petitioners and the authorities. On December 4, 1958, the Drugs Controller, Delhi State, stopped the sale of forty of their products set out in the petition. Subsequently objection was taken by the Drugs Controller to the advertisement in regard to other drugs. Similarly objections were taken by the Drugs Controllers of other States to various advertisements in regard to medicines and drugs prepared by the petitioners. They submitted that the various advertisements which had been objected to were prepared in accordance with the Unani system and the drugs bore Unani nomenclature which had been recognised in the whole world for several centuries past. The Act is assailed on the ground

of discrimination under Article 14, excessive delegation and infringement of the right of free speech under Article 19 (1) (*a*) and their right to carry on trade and business under Article 19 (1) (*f*) and (*g*). Objection is also taken under Articles 21 and 31. The petitioners therefore prayed for a declaration that the Act and the Rules made thereunder were *ultra vires* and void as violative of Part III of the Constitution and for the issuing of a writ of *mandamus* and prohibition and for quashing the proceedings and the notices issued by the various authorities—the respondents.

In their counter-affidavit the respondents submitted that the method and manner of advertisement of drugs by the petitioners and others clearly indicated the necessity of having an Act like the impugned Act and its rigorous enforcement. The allegations in regard to discrimination and impairment of fundamental rights under Article 19 (1) (*a*) (*f*) and (*g*) and any infringement of Articles 21 and 31 were denied and it was stated :—

"The restriction is about the advertisement to the people in general. I say that the main object and purpose of the Act is to prevent people from self-medicating with regard to various serious diseases. Self-medication in respect of diseases of serious nature mentioned in the Act and the Rules has a deleterious effect on the health of the community and is likely to affect the well-being of the people. Having thus found that some medicines have tendency to induce people to resort to self-medication by reason of elated advertisements, it was thought necessary in the interest of public health that the puffing up of the advertisements is put to a complete check and that the manufacturers are compelled to route their products through recognised sources so that the products of these manufacturers could be put to valid and proper test and consideration by expert agencies."

It was also pleaded that the advertisements were of an objectionable character and taking into consideration the mode and method of advertising conducted by the petitioners the implementation of the provisions of the impugned Act was justified. Along with their counter-affidavit the respondents have placed on record Exhibit-A, which is a copy of the literature which accompanied one of the various medicines put on sale by the petitioners and/or was stated on the cartons in which the medicine was contained. In their affidavit in rejoinder the petitioners reiterated that Unani and Ayurvedic systems had been discriminated against ; that self-medication had no deleterious effect on the health of the community ; on the contrary it

"is likely to affect the well-being of the people, in the context of effective household and domestic remedies based on local herbs popularly known to them in rural areas. Self-medication has its permission (?) limits even in America and Canada where unlicensed itinerant vendors serve the people effectively".

For the petitioners in all the petitions Mr. Munshi raised four points :

(1) Advertisement is a vehicle by means of which freedom of speech guaranteed under Article 19 (1) (*a*) is exercised and the restrictions which are imposed by the Act are such that they are not covered by clause (2) of Article 19 ;

(2) That Act, the Rules made thereunder and the Schedule in the Rules impose artbitrary and excessive restrictions on the rights guaranteed to the petitioners by Article 19 (1) (*f*) and (*g*) ;

(3) Section 3 of the Act surrenders unguided and uncanalised power to the executive to add to the diseases enumerated in section 3 ;

(4) Power of confiscation under section 8 of the Act is violative of the rights under Articles 21 and 31 of the Constitution.

In Petitions Nos. 62 and 63 of 1959 which relate to two branches of *Sadhana Ausadhalaya* at Poona and Allahabad respectively Mr. N. C. Chatterjee, after giving the peculiar facts of those petitions and the fact that the petitioners' Poona branch was raided without a warrant, a number of medicines had been seized, and a complaint filed against the petitioners in that petition, submitted that section 3 (*b*) of the Act was meant to strike down abnormal sexual activities, that advertisements in that case merely mentioned the names of the diseases and suggested the drug for the treatment of those diseases, that the prohibition of such advertisements was

an unreasonable restriction on their fundamental right ; that there was nothing indecent in saying that their medicine was a cure for a particular disease and that the Act was an undue interference with cure and treatment of diseases.

We now proceed to consider the vitality of the arguments raised on behalf of the petitioners. Firstly it was submitted that the restriction on advertisements was direct abridgement of the right of free speech and advertisements could not be brought out of the guaranteed freedom under Article 19 (1) (*a*) because no dividing line could be drawn and freedom of speech could not be curtailed by making it subject to any other activity. The learned Solicitor-General, on the other hand, contended that it was necessary to examine the pith and substance of the impugned Act and if it was properly considered it could not be said to have in any way curtailed, abridged or impaired the rights guaranteed to the petitioners under Article 19 (1) (*a*). He also contended that the prohibited advertisements did not fall within the connotation of " freedom of speech ". The doctrine of pith and substance, submitted Mr. Munshi, was created for the purpose of determining the legislative competence of a Legislature to enact a law and he sought to get support from the following observation of Venkatarama Aiyar, J., in *A. S. Krishna* v. *State of Madras*[1] :—

" ....and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial Legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was *intra vires* regard must be had to its pith and substance ".

Though the doctrine of ' pith and substance ' was evolved to determine the constitutionality of an enactment in reference to the legislative competence of a Legislature particularly under a Federal Constitution with a distributive system of powers it has been used in other contexts in some cases, *e.g.*, in connection with the determination of the constitutionality of statutes restricting the rights to carry on certain activities and the consequent infringement of Article 19 (1) (*g*): by Mahajan, C.J., in *Cooverjee B. Bharucha* v. *The Excise Commissioner and the Chief Commissioner of Ajmer*[2], in the case of Excise Regulation (I of 1915) regulating the import, export, transport, manufacture, sale and possession of intoxicating drugs and liquor and imposing duties thereon ; by Das, C.J., in *State of Bombay* v. *R. M. D. Chamarbaughwala*[3] in connection with a statute which was held not to be interference with trade, commerce or intercourse as such but to save it from anti-social activities.

It is unnecessary to decide in the present case whether in its scope it extends to the determination of the constitutionality of an enactment with reference to the various sub-clauses of clause (1) of Article 19. A more appropriate approach to the question is, in our opinion, contained in the dictum of Mahajan, J. (as he then was) in *Messrs. Dwarka Prasad Laxmi Narain* v. *The State of Uttar Pradesh*[4]. There he held that

" in order to decide whether a particular legislative measure contravenes any of the provisions of Part III of the Constitution it is necessary to examine with some strictness the substance of the legislation in order to decide what the Legislature has really done. Of course the Legislature cannot bypass such constitutional prohibition by employing indirect methods and therefore the Court has to look behind the form and appearance to discover the true character and nature of the legislation ".

Therefore when the constitutionality of an enactment is challenged on the ground of violation of any of the Articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, *i.e.* its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease

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1. (1957) 1 M.L.J. (S.C.) 59 : (1957) 1 An. W.R. (S.C.) 59 : (1957) M.L.J. (Crl.) 88 : (1957) S.C.J. 216 : (1957) S.C.R. 399, 406, 410.
2. (1954) S.C.J. 246 : 1954 S.C.R. 873, 877.
3. (1957) 2 M.L.J. (S.C.) 87 : (1957) 2 An. W.R. (S.C.) 87 : (1957) M.L.J. (Crl.) 558 : (1957) S.C.J. 607 : (1957) S.C.R. 874.
4. (1954) 1 M.L.J. 355 : (1954) S.C.J. 175 : (1954) S.C.R. 674, 683.

which the Legislature resolved to cure and the true reason for the remedy ; *Bengal Immunity Company Ltd.* v. *The State of Bihar*[1]; *R. M. D. Chamarbaughwala* v. *The Union of India*[2] ; *Mahant Moti Das* v. *S. P. Sahi*[3].

Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the Legislature understands and appreciates the need of the people and the laws it enacts are directed, to problems which are made manifest by experience and that the elected representatives assembled in a Legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. *Charanjit Lal Chowdhuri* v. *The Union of India*[4]; *The State of Bombay* v. *F. N. Balsara*[5]; *Mahant Moti Das* v. *S. P. Sahi*[3].

What then was the history behind the impugned legislation and what was the material before the Parliament upon which it set out to enact the impugned Act.

(1) In 1927 a resolution was adopted by the then Council of States recommending to the Central and Provincial Governments to take immediate measures to control the indiscriminate use of medical drugs and for standardisation of the preparation and for the sale of such drugs. In August, 1930, in response to the public opinion on the subject and in pursuance of that resolution the Government of India appointed the Drugs Enquiry Committee with Sir R. N. Chopra as its Chairman to enquire into the extent of the quality and strength of drugs imported, manufactured or sold in India and to recommend steps for controlling such imports, manufacture and sale in the interest of the public. This Committee made a report pointing out the necessity of exercising control over import, manufacture and sale of patent and proprietary medicines in the interst of the safety of the public and public health. The report pointed out in paragraphs 256-259 how in other countries control was exercised and restrictive laws to achieve that end had been enacted. In the Appendix to this Report was given a list of a number of samples of advertisements of patent and proprietary medicines dealing with cures of all kinds of diseases.

(2) As a result of the Chopra Committee Report the Drugs Act was passed in 1940.

(3) In 1948 The Pharmacy Act was passed to regulate the provisions of pharmacy. As a result of these two enactments the State Governments were given the responsibility of controlling the manufacture of drugs and pharmaceuticals and their sales through qualified personnel and the Central Government was given the control on quality of drugs and pharmaceuticals imported into the country.

(4) The Chopra Committee Report dealt with the popularity of the patent and proprietary medicines in the following words :

> " The pride of place must be accorded to ingenious propaganda clever and attractive dissemination of their supposed virtues and wide and alluring advertisements. The credulity and gullibility of the masses, especially when ' certain cures ' are assured in utterly hopeless cases, can well be imagined. Perusal of the advertisements of ' cures ' produces a great effect on patients who have tried treatment by medical men without success. Such patients resort to any and every drug that comes in their way. In an infinitesimal small number of cases spontaneous cures are also effected. Widest publicity is given to these and the preparations become invested with miraculous virtues. The reassurances of cure, the force of argument advanced to guarantee it and the certificates of persons said to have been cured which are all set out in advertisements make a deep impression, especially on those with weak nerves. The love of mystery and secrecy inherent in human nature, the natural disinclination and shyness to disclose details of one's illness especially those involving moral turpitude, the peculiar temperament of the people who, high and low, rich and poor, demand ' something in a bottle ' for the treatment of every ailment and poverty of the people who cannot

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1. (1955) 2 M.L.J. (S.C.): 168 (1955) S.C.J. 672 : (1955) 2 S.C.R. 603, 632, 633.
2. (1957) 2 M.L.J. (S.C.) 76 : (1957) M.L.J. (Crl.) 547 : (1957) 2 An. W.R. (S.C.) 76: (1957) S.C.J. 593 : (1957) S.C.R. 930, 936.
3. (1959) S.C.J. 1144 : A.I.R. 1959 S.C. 942, 948.
4. (1951) S.C.J. 29: 1950 S.C.R. 869.
5. (1951) 2 M.L.J. 141 : (1951) S.C.J. 478 : 1951 S.C.R. 682, 708.

afford to pay the doctor's bills or the high prices current for dispensed medicines, have all been enlarged upon as tending to self-diagnosis and self-medication by patent and proprietary medicines ".

(5) Evidence was led before the Chopra Committee deprecating the increasing sale of proprietary medicines particularly those with secret formulae as such drugs were positively harmful and were a serious and increasing menace. There were advertisements and pamphlets issued in connexion with these medicines which showed fraudulent practices and extravagant claims for these medicines.

(6) The Chopra Committee Report had also made a recommendation for a strict measure of control over proprietary medicines.

(7) The Bhatia Committee was set up in pursuance to a resolution No. CI-I (12)/52, dated 14th February, 1953 and between March, 1953 and end of that year it examined a large number of witnesses in different towns of India some of whom represented chemists and druggists, some were leading medical practitioners and some were State Ministers for Health. The Bhatia Committee issued a questionnaire to various organisations and witnesses. It contained questions in regard to advertisement of drugs and therefore one of the objects of this Committee which was inaugurated by the Health Minister on 12th March, 1953, was amongst other things to look into the control to be exercised over objectionable and unethical advertisements.

(8) There were a large number of objectionable advertisements in the press in regard to patent medicines which were after the Act came into force pointed out by the Press Commission Report but it cannot be said that this fact was unknown to Parliament as this Committee also examined a number of witnesses.

(9) The Indian Medical Association had suggested to this Press Committee which was presided over by the late Mr. Justice Rajadhyaksha the barring of advertisements of medicines which claim to cure or alleviate any of the following dieseases :

Cancer, Bright's disease, Cataract, Diabetes, Epilepsy, Glaucoma, Locomotor ataxia, Paralysis, Tuberculosis.

(10) In the United Kingdom, advertisements of drugs or treatment for these diseases are governed by the Cancer Act of 1939 and the Pharmacy and Medicines, Act of 1941. (Advertisements relating to the treatment of venereal diseases are governed by the Venereal Diseases Act of 1917).

(11) Wyndham E. B. Lloyd in his book ' Hundred years of medicine ' published in 1936 wrote about the outstanding evils which arise from the use of secret remedies and nostrums. It also drew attention to the dangers of advertisements in regard to them and what the British Medical Association had said about them.

(12) The British Medical Association had in a book entitled ' *Secret Remedies What they cost and contain* ' exposed ruthlessly the harmful effects of such remedies. The council on Pharmacy and Chemistry of American Medical Association had also given its opinion on the harmful effects of indiscriminate self-medication by the public and the grave danger which ensued from such misdirected and inadequate treatment, and the failure to recognise seriousness of the disease only when it was too late.

It is not necessary to refer to the recommendations of the Bhatia Committee or the Press Enquiry Committee because they were published in June and July, 1954, respectively.

In England as far back as 1889 an Act called the Indecent Advertisements Act (52 and 53 Vict., Chapter 18) was passed to suppress indecent advertisements in which advertisements relating to syphilis, gonorrhoea, nervous debility or other complaints or infirmity arising from intercourse was prohibited. In 1917 the Venereal Diseases Act (7 and 8 Geo. V Ch. 21) was passed in England, This placed restrictions on advertisements relating to treatment for venereal diseases. In 1941 the Pharmacy and Medicine Act, 1941 (4 and 5 Geo. VI, Ch. 42) was passed which

corresponds in material particulars to the impugned Act. It cannot be said that there was no material before Parliament on the basis of which it proceeded to enact the impugned legislation. This material shows the history of the legislation, the ascertained evil intended to be cured and the circumstances in which the enactment was passed. In *Shri Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar*[1], Das, C.J., observed :—

> "that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; ".

Thus it is open to the Court for the purpose of determining the constitutionality of the Act to take all these facts into consideration and in the present case we find that there was the evil of self-medication, which both in this country and in other countries, the medical profession and those, who were conversant with its dangers, had brought to the notice of the people at large and the Government in particular. They had also warned against the dangers of self-medication and of the consequences of unethical advertisements relating to proprietary medicines particularising those diseases which were more likely to be affected by the evil. There is reason, therefore, for us to assume that the state of facts existed at the time of the legislation which necessitated the Act. These facts we have already set out and it is not necessary to reiterate them.

With this background in view we proceed to examine the provisions of the Act and ascertain the predominant purpose, true intent, scope and the object of the Act. The Preamble shows that the object of the Act was to control the advertisement of drugs in certain cases, *i.e.* diseases and to prohibit advertisements relating to remedies pretending to have magic qualities and provide for other matters connected therewith. The title of the Act also shows that it is directed against objectionable advertisements. The definition section (section 2) in clause (*a*) defines advertisements and in clause (*b*) drugs which include (i) medicines for use of human beings and animals, (ii) substances for use of diagnosis, treatment or prevention of diseases in human beings and animals, (iii) articles other than food which affect the organic functions of the body of human beings or animals and (iv) articles intended for use as a component of any medicine, etc. Clause (*c*) defines magic remedies to include a talisman, mantra, kavacha and other charms and (*d*) relates to the publication of any advertisement and (*e*) what a venereal disease is. Section 3 prohibits advertisements of drugs for treatment of diseases and disorders. Clause (*a*) of section 3 deals with procurement of miscarriage in women or prevention of conception ; clause (v) with maintenance or improvement of capacity of human beings for sexual pleasure ; clause (*c*) with diagnosis and cure of venereal and other diseases. Section 4 prohibits misleading advertisements relating to drugs. Section 5 similarly prohibits advertisements of magic remedies efficacious for purposes specified in section 3. Section 6 prohibits the import into and export from India of certain advertisement. Section 14 is a saving clause which excludes registered practitioners, treatises or books, advertisements sent confidentially to medical practitioners, wholesale or retail chemists for distribution among registered medical practitioners or to hospitals or laboratories. It also excludes advertisements printed or published by Government or with the previous sanction of the Government. Section 15 gives the Government the power to grant exemptions from the application of sections 3, 4, 5 and 6 in certain cases.

As already stated when an enactment is impugned on the ground that it is *ultra vires* and unconstitutional, what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole, to its objects, purpose and true intention and to the scope and effect of its provisions or what they are directed against and what they aim at. *A. S. Krishna* v. *State of Madras*[2]. Thus examined it cannot be said that the object of the Act was merely

1. (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An. W.R. (S.C.) 67 : (1959) S.C.J. 147: 1959 S.C.R. 279, 297.

2. (1957) 1 M.L.J. (S.C.) 59 : (1957) 1 An. W.R. (S.C.) 59 : (1957) S.C.J. 216 : (1957) M. L.J. (Crl.) 88 : (1957) S.C.R. 399, 406, 410.

to put a curb on advertisements which offend against decency or morality but the object truly and properly understood is to prevent self-medication or treatment by prohibiting instruments which may be used to advocate the same or which tend to spread the evil. No doubt in section 3 diseases are expressly mentioned which have relation to sex and disorders peculiar to women but taken as a whole it cannot be said that the object of the Act was to deal only with matters which relate to indecency or immorality. The name and the Preamble are indicative of the purpose being the control of all advertisements relating to drugs and the use of the word animals in clause (*b*) of the definition section negatives the object being merely to curb emphasis on sex and indecency. Section 4 further suggests that the Legislature was trying to stop misleading advertisements relating to drugs. Section 5 also tends to support the object being prohibition of advertisements suggesting remedies for all kinds of diseases. Section 6 also points in the same direction, *i.e.* to stop advertisements as to drugs. Sections 14 and 15 are a clearer indication that there should be no advertisements for drugs for certain diseases in order that the general public may not be misled into using them for ailments which they may imagine they are suffering from and which they might believe to be curable thereby. That this is so is shown by the fact that such advertisements can be sent to medical practitioners, hospitals and laboratories. The exclusion of Government advertisements and the power to give exemption all point to the objective being the stopping of advertisements of drugs for the object above mentioned and not merely to stop advertisements offending against morality and decency.

Mr. Munshi's argument was that section 3 was the key to the Act and that the object and direct effect of the Act was to stop advertisements and thereby impair the right of free speech by directly putting a prohibition on advertisement. If the contention of Mr. Munshi were accepted then the restriction to be valid must fall within clause (2) of Article 19 of the Constitution. In other words it must have relationship with decency or morality because the other restrictions of that clause have no application. If on the other hand the submission of the learned Solicitor-General is accepted, then the matter would fall under sub-clauses (*f*) and (*g*) and the restriction under Article 19 (6). The object of the Act as shown by the scheme of the Act and as stated in the affidavit of Mr. Merchant is the prevention of self-medication and self-treatment and a curb on such advertisements is a means to achieve that end. Objection was taken that the Preamble in the Act does not indicate the object to be the prevention of treatment of diseases otherwise than by qualified medical practitioners as the English Venereal Diseases Act, 1917 does. In this Court in many cases affidavits were allowed to be given to show the reasons for the enactment of a law, the circumstances in which it was conceived and the evils it was to cure. This was done in the case of *Shri Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar*[1]. Similarly in *Kathi Raning* v. *The State of Saurashtra*[2] and in *Kavalappara Kottarathil Kochunni* v. *The State of Madras*[3] affidavits were allowed to be filed setting out in detail the circumstances which led to the passing of the respective enactments.

In support of his argument that any limitation of his right to advertise his goods was an infringement of his freedom of speech because advertisement was a part of that freedom Mr. Munshi relied upon *Alma Lovell* v. *City of Griffin*[4]. In that case the objection was taken to the validity of a Municipal Ordinance prohibiting the distribution without a permit of circulars, handbooks, advertising or literature of any kind on the ground that such ordinance violated the First and the Fourteenth amendment by abridging the freedom of the Press and it was held that such prohibition was invalid at its face as infringing the constitutional freedom of the Press and constitutional guarantee of such freedom embraced pamphlets and leaflets. The actual violation which was complained of in that

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1. (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An. W.R. (S.C.) 67 : (1959) S.C.J. 147 : (1959) S.C.R. 279.
2. (1952) S.C.J. 168 : 1952 S.C.R. 435.
3. (1959) 2 M.L.J. (S.C.) 70 : (1959) 2 An. W.R. (S.C.) 70 : (1959) S.C.J. 858 : A.I.R. 1959 S.C. 725.
4. 82 Law. Ed. 949 : 303 U.S. 444.

case consisted of the distribution without the required permission of pamphlets and magazines in the nature of religious tracts. Chief Justice Hughes said :—

> "The Ordinance in its broad sweep prohibits the distribution of 'circulars, handbooks, advertising or literature of any kind.' It manifestly applies to pamphlets, magazines and periodicals."

No doubt the word advertisement was used both in the Ordinance as well as in the opinion by the learned Chief Justice but the case actually related to the distribution of pamphlets and magazines. Mr. Munshi also relied on *Express Newspapers (Private), Ltd.* v. *The Union of India*[1] where the cases dealing with freedom of speech were discussed by Bhagwati, J., but the question of advertisements as such did not arise in that case.

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19 (1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas—social, political or economic or furtherance of literature or human thought ; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part, and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution. In *Lewis J. Valentine* v. *F. J. Chrestensen*[2], it was held that the constitutional right of free speech is not infringed by prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter. The object of affixing of the protest to the advertising circular was the evasion of the prohibition of a City Ordinance forbidding the distribution in the city streets of commercial and business advertising matter. Mr. Justice Roberts delivering the opinion of the Court said :—

> "This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the States and Municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on Government as respects purely commercial advertising ....If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the Code provisions was lawfully invoked against such conduct."

It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Article 19 (1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not to propagating of ideas ; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Article 19 (1) (*a*). The main purpose and true intent and aim, object and scope of the Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. Can it be said that this is an abridgement of the petitioners' right of free speech ? In our opinion it is not. Just as in *Chamarbaughwalla's case*[3] it was said that activities undertaken and carried on with a view to earning profits, *e.g.*, the business of betting and gambling will not be protected as falling within the guaranteed right of carrying on business or trade, so it cannot be said that an advertisement commend-

1. (1958) S.C.J. 1113 : 1959 S.C.R. 12 at 123 to 133.
2. 86 Law. Ed. 1262
3. (1957) S.C.J. 593 : (1957) 2 An. W.R. (S.C.) 76 : (1957) 2 M.L.J. (S.C.) 76 : (1957) M.L.J. (Crl.) 547 : (1957) S.C.R. 930, 936.

ing drugs and substances as appropriate cure for certain diseases is an exercise of the right of freedom of speech. Das, C.J., in *State of Bombay* v. *R. M. D. Chamarbaughwala's case*[1] said at page 920 :—

"We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instrucments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words".

One has only to substitute for the words "trade or business or commerce" the phrase "freedom of speech" to see how it applies to the present case. Freedom of speech goes to the heart of the natural right of an organised freedom-loving society to "impart and acquire information about that common interest". If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Article 19 (1) (*a*). But if all it does is that it deprives a trader from commending his wares it would not fall within that term. In *John W. Rast* v. *Van Deman and Lewis Company*,[2] Mr. Justice McKenna dealing with advertisements said :—

"Advertising is merely identification and description, apprising of quality and place, It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase".

As we have said above advertisement takes the same attributes as the object it seeks to promote or bring to the notice of the public to be used by it. Examples can be multiplied which would show that advertisement dealing with trade and business has relation with the item "business or trade" and not with "freedom of speech". Thus advertisements sought to be banned do not fall under Article 19 (1) (*a*).

It was also contended that the prohibition against advertisements of the petitioners was a direct abridgement of the right of freedom of speech and *Alice Lee Grosjean* v. *American Press Co.*[3], was relied upon. That was a case in which a tax was levied based on gross receipts for the privilege of engaging in the business of public advertisements in newspapers, magazines, etc. having a specified circulation and it was there held that such a statute abridged the freedom of the press because its effect was not merely to reduce revenue but it had tendency to curtail circulation. This subject was discussed in *Express Newspapers' case*[4] at pages 128 to 133 where the question was whether the Wage Board Act specifying the wages and conditions of service of the working journalists and thus imposing certain financial burden on the press was an interference with the right of freedom of Press and Mr. Justice Bhagwati said at page 135 :—

"Unless these were the direct or or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the Legislature while enacting a measure of this type for the benefit of the workmen concerned".

In considering the constitutionality of a statute the Court has regard to substance and not to mere matters of form and the statute must be decided by its operation and effect ; *J. M. Near* v. *State of Minnesota*[5].

In the present case therefore (1) the advertisements affected by the Act do not fall within the words freedom of speech within Article 19 (1) (*a*) ; (2) the scope and object of the Act its true nature and chraacter is not interference with the right of freedom of speech but it deals with trade or business ; and (3) there is no direct abridgement of the right of free speech and a mere incidental interference with such right would not alter the character of the law : *Ram Singh* v. *The State of Delhi*[6] ; *Express Newspapers (Private) Ltd.* v. *The Union of India*[4].

It is not the form or incidental infringement that determines the constitutionality of a statute in reference to the rights guaranteed in Article 19 (1), but the

1. (1957) S.C.J. 607 : (1957) 2 An. W.R. (S.C.) 87 : (1957) 2 M.L.J. (S.C.) 87 : 1957 M.L.J. (Crl.) 558: (1957) S.C.R. 874.
2. 60 Law. Ed. 679, 690.
3. 80 Law Ed. 660.
4. (1958) S.C.J. 1113 : (1959) S.C.R. 12 at 128 to 133.
5. 75 Law. Ed. 357, 363-4.
6. (1951) S.C.J. 374 : (1951) S.C.R. 451,

reality and substance. The Act read as a whole does not merely prohibit advertisements relating to drugs and medicines connected with diseases expressly mentioned in section 3 of the Act but they cover all advertisements which are objectionable or unethical and are used to promote self-medication or self-treatment. This is the content of the Act. Viewed in this way, it does not select any of the elements or attributes of freedom of speech falling within Article 19 (1) (*a*) of the Constitution.

It was next argued that assuming that the matter was within clauses (*f*) and (*g*) of Article 19 (1) the restraint was disproportionate to the purpose of the Act, the object sought to be achieved and the evil sought to be remedied. It was further argued that it could not be said that the restrictions imposed by the Act were in, the interest of the general public. The basis of this argument was (1) the very wide definition of the word 'advertisement' in section 2 (*a*) ; (2) the use of the word 'suggest' in section 3 ; (3) the uncanalised delegated power to add diseases to the schedule ; (4) the existence of section 14 (*c*) read with rule 6 of the Rules and (5) the procedural part in sectilon 8 of the Act ; all of which, according to counsel, showed that it was beyond all allowable limits of restraint under clause (6) of Article 19.

'Advertisement' in the Act, it was argued, included not only advertisements in newspapers and periodicals and other forms of publication but also on cartons, bottles and instructions inside a carton. Without this latter kind of advertisement, it was submitted, the user would be unable to know what the medicine was, what it was to be used for and how ? If the purpose of the Act is to prevent objectionable and unethical advertisements in order to discourage self-medication and self-treat ment it cannot be said that the definition is too wide keeping in view the object and the purpose of the Act which have been set out above. It is these evils which the Act seeks to cure and if the definition of the word 'advertisement' was not so broad and inclusive it would defeat the very purpose for which the Act was brought into existence.

The argument that the word 'suggest' is something subjective is, in our opinion, also not well-founded. 'Suggest' has many shades of meaning and in the context it means commendatory publication. It connotes a direct approach and its use in section 3 does not support the contention that the restraint is disproportionate. In another part of the judgment we shall discuss the constitutionality of the power of delegation, and reasonableness of the range of diseases added in the schedule and it is unnecessary to go over the same field here.

Then we come to section 14 (*c*) and rule 6, *i.e.*, prohibited advertisement is to be sent confidentially by post to a registered medical practitioner or to a wholesale and retail chemist or a hospital and laboratory and the following words have to be inscribed on the outside of every packet containing the advertisement, *i.e.*, "for the use only of registered medical practitioners or a hospital or a laboratory". If the purpose is to discourage self-medication and encourage treatment by properly qualified medical practitioners then such a regulatory provision cannot be considered an excessive restraint. The mere fact that in the corresponding English Act certain persons are also mentioned and that such advertisements can be published in certain medical journals and scientific treatises is not a ground for holding the restriction to be disproportionate. It is not a proper method of judging the reasonableness of the restrictions to compare every section of the Act with the corresponding English Act and then to hold it unreasonable merely because the corresponding sections of the two Acts are different. The evil may be the same but the circumstances and conditions in the two countries in regard to journals may be different and there are bound to be differences in the degree of restrictiveness in the operative portions of the two Acts. The policy behind the Act is that medication should be on the advice of qualified medical practitioners. Merely because the Legislature thought that it would not exclude advertisements in medical journals of the country would not be indicative of the disproportion of the restraint.

Objection was then taken to the procedural part in section 8 and it was submitted that the power of search, seizure and detention was unfettered and very wide and there is no proper procedure laid down as in the Criminal Procedure Code or the Drugs Act and there are no rules and safeguards in regard to search warrants or entry into premises as there are in the Code of Criminal Procedure or the Drugs Act. In another part of the judgment we shall deal with this question and it is not necessary to do so here.

It was next contended that the Act was not in the interest of the general public as it could not be said that the mention of the names of diseases or instructions as to the use of particular medicines for those diseases was not in the interest of the general public. Besides it would prevent the medicines being brought to the notice of the practising medical practitioners or distributing agencies. It would also prevent a properly worded advertisement suggesting cure of diseases to people who for the sake of prestige and other understandably valid reasons do not like to confide to any person the nature of their diseases and that it would prevent medical relief in a country where such relief is notoriously inadequate. We have already set out the purpose and scope of the Act, the conditions in which it was passed and evils it seeks to cure. If the object is to prevent self-medication or self-treatment, as it appears to be, then these are exactly the evils which such advertisements would subserve if a piece of legislation like the Act did not exist. It has not been shown that the restrictions laid down in the Act are in any manner disproportionate to the object sought to be attained by the Act nor has it been shown that the restrictions are outside the permissible limits.

Mr. Chatterjee in dealing with this point drew our attention to the test of reasonableness as laid down in *Chintaman Rao* v. *The State of Madhya Pradesh*[1], where it was said by Mahajan, J. (as he then was) at pages 762 and 763 :—

> " The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation ; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Article 19 (1) (*g*) of the Constitution ".

It has not been shown in the present case that under the guise of protecting public interest the Act arbitrarily interferes with private business or imposes unreasonable restrictions. If the true intention of the Act is, as indeed it is, to stop objectionable and unethical advertisements for the purpose of discouraging self-medication no question of unreasonable restrictions arises. Mr. Chatterjee also relied upon the observation of Bose, J. in *Dwarka Das Srinivas of Bombay* v. *The Sholapur Spinning and Weaving Company, Limited*[2], where the learned Judge said that

> "the provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred ".

With this statement we are in accord. The interpretation should be such as to subserve the protection of the fundamental rights of the citizen but that is subject to limitations set out in Article 19 itself which are for the general welfare of all citizens taken as a whole and are therefore for the interest of the general public. Mr. Chatterjee further contended that the restraint was excessive because the prohibition of a mere mention of the name of a disease and the suggestion of a cure for that could not be a reasonable restriction. As submitted by the learned Solicitor-General the objection is not to the names but to the advertisements commending certain medicines as a cure for the same and this is what the Act is endeavouring to eliminate. In our opinion it cannot be said that the restrictions are either excessive or disproportionate or are not in the interest of the general public.

The third point raised by Mr. Munshi was that the words ' or any other disease or condition which may be specified in the rules made under this Act ' in clause (*d*) of section 3 of the Act are delegated legislation and do not lay down any certain criteria or proper standards, and surrender unguided and uncanalised power to the

1. (1950) S.C.J. 571 : (1950) S.C.R. 759.
2. (1954) 1 M.L.J. 355 : (1954) S.C.J. 175: (1954) S.C.R. 674, 733 (S.C.).

executive to add to diseases in the schedule. The learned Solicitor-General in reply supported the schedule as a case of conditional legislation and not the exercise of delegated legislative power and he further contended that even if it was held to be the latter it was within the limits recognised by judicial decisions. The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective ; *Hampton and Co.* v. *United States*[1] and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent. This means that the Legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the Legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend : (*The Queen* v. *Burah*[2] ; *Charles Russell* v. *The Queen*[3] ; *Emperor* v. *Benoarilal Sarma*[4] ; *Sardar Indar Singh* v. *State of Rajasthan*[5]). Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. But when the legislation is complete in itself and the Legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation. To put it in the language of another American case :

> " To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or the things future and impossible to fully know".

The proper distinction there pointed out was this :

> " The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legsilation must depend which cannot be known to the law-making power, and, must therefore be subject of enquiry and determination outside the hall of Legislature ". *In Loches Appeal*[6] ; *Field* v. *Clark*[7].

But the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should not be so indefinite as to amount to an abdication of the legislative function. Schwartz : American Administrative Law, page 21.

In an Australian case relied upon by the learned Solicitor-General the prohibition by proclamation of goods under section 52 of the Customs Act, 1901, was held to be conditional legislation : *Baxter* v. *Ah Way*[8]. According to that case the Legislature has to project its mind into the future and provide as far as possible for all contingencies likely to arise in the application of the law, but as it is not possible to provide for all contingencies specifically for all cases, the Legislature resorts to conditional legislation leaving it to some specified authority to determine in what circumstances the law should become operative or to what its operation should be extended, or the particular class of persons or goods to which it should be applied : *Baxter's case*,[8] at pages 637 and 638.

Broadly speaking these are the distinguishing features of the two forms of delegation and these are their characteristics. The question is in which compartment does the power given in the Act fall.

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1. 276 U.S. 394.
2. L.R. 3 A.C. 889.
3. L.R. 7 A.C. 829, 835.
4. (1945) 1 M.L.J. 76 : (1945) F.L.J. 1 : 1945) F.C.R. 161 : L.R. 72 I.A. 57.
5. (1957) S.C.J. 376 : (1957) S.C.R. 604.
6. 72 Pa. 491.
7. 143 U.S. 649.
8. 8 Com. L.R. 626, 634, 637, 638

The power given to the authority under that provision (section 3) of the Act is contained in clause (*d*) in the following words :—

" *Section* 3.—Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for..

(*d*) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in rules made under this Act."

And power to make rules is laid down in section 16 which is as follows :—

Section 16. (1) " The Central Government may by notification in the official gazette make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) specify any disease or condition to which the provisions of section 3 shall apply ;

(*b*) prescribe the manner in which advertisement of articles or things referred to in clause (*c*) of sub-section (1) of section 14 may be sent confidentially ".

For the petitioner it was argued that section 3 (*d*) is delegated legislation and not conditional legislation as the power delegated therein is only to specify conditions and diseases in the Rules.

The interdiction under the Act is applicable to conditions and diseases set out in the various clauses of section 3 and to those that may under the last part of clause (*d*) be specified in the Rules made under section 16. The first sub-section of section 16 authorises the making of Rules to carry out the purposes of the Act and clause (*a*) of sub-section (2) of that section specifically authorises the specification of diseases or conditions to which the provisions of section 3 shall apply. It is the first sub-section of section 16 which confers the general rule-making power, *i.e.*, it delegates to the administrative authority the power to frame rules and regulations to subserve the objective and purpose of the Act. Clause (*a*) of the second sub-section is merely illustrative of the power given under the first sub-section : *Emperor* v. *Sibnath Bannerjee*[1]. Therefore sub-section (2) (*a*) also has the same object as sub-section (1), *i.e.*, to carry out the purposes of the Act. Consequently when the rule-making authority specifies conditions and diseases in the Schedule it exercises the same delegated authority as it does when it exercises powers under sub-section (1) and makes other rules and therefore it is delegated legislation. The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumsrances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in section 3 (*d*) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the Rules must be struck down. But that would not affect such conditions and diseases which properly fall within the four clauses of section 3 excluding the portion of clause (*d*) which has been declared to be unconstitutional. In the view we have taken it is unnecessary to consider the applicability of *Baxter* v. *Ah Way*[2].

We are of the opinion therefore that the words " or any other disease or condition which may be specified in the Rules made under this Act" confer uncanalised and uncontrolled power to the Executive and are therefore *ultra vires*. But their being taken out of clause (*d*) of section 3 does not affect the constitutionality of the rest of the clause or section as they are severable : *R. M. D. Chamarbaughwala* v. *The Union of India*[3].

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1. (1945) F.L.J. 222 : (1945) F.C.R. 195 : (1945) 2 M.L.J. 325 : L.R. 72 I.A. 241.
2. 8 Com. L.R. 626.
3. (1957) S.C.J. 593 ; (1957) 2 An.W.R. (S.C.) 76 : (1957) 2 M.L.J. (S.C.) 76 : 1957 M.L.J. (Crl.) 547 : (1957) S.C.R. 930, 936.

The constitutionality of section 8 of the Act was challenged on the ground that it violated the petitioners' right under Articles 21 and 31. That section when quoted runs as follows :

> "Any person authorised by the State Government in this behalf may, at any time, seize . . . . and detain any document, article or thing which such person has reason to believe, contains any advertisement which contravenes any of the provisions of this Act and the Court trying such contravention may direct that such document (including all copies thereof) article or thing shall be forfeited to the Government."

It was pointed out by Mr. Munshi that there was no limitation placed on, no rules and regulations made for and no safeguards provided in regard to the powers of a person authorised in that behalf by Government to seize and detain any document, article or anything which in the opinion of such person contains any advertisement contravening any of the provisions of the Act. It was also submitted that in the corresponding English Act of 1939 in section 10 there are proper safeguards provided in regard to the exercise of the power of seizure, etc. The first part of section 8 of the Act dealing with seizure and detention received slender support from the Solicitor-General. It may be, he contended, that having regard to the purpose and object of the Act the Indian legislature did not think it necessary to provide any safeguards and that the Legislature thought that nobody would be prejudiced by reason of the want of safeguard previous to the seizure. In our opinion this portion of the section goes far beyond the purpose for which the Act was enacted and, the absence of the safeguards which the Legislature has thought it necessary and expedient in other statutes, *e.g.*, the Indian Drugs Act, is an unreasonable restriction on the fundamental rights of the petitioners and therefore the first portion of the section, *i.e.*, "any person authorised by any of the provisions of this Act" is unconstitutional. What then is the consequence of this unconstitutionality? If this portion is excised from the rest of the section the remaining portion is not even intelligible and cannot be upheld. The whole of the section must therefore be struck down.

By a portion of clause (*d*) of section 3 and the whole of section 8 being declared unconstitutional the Act is not thereby affected as they are severable from the rest of the Act. As a consequence of excision of that portion and of section 8 from the Act the operation of the remaining portion of the Act remains unimpaired. *R. M. D. Chamarbaughwala* v. *The Union of India*[1]. As a result of section 8 being declared invalid, all the goods seized from the petitioners having been seized without the authority of law must be returned to the respective petitioners. It will be for the Government to take such action in regard to the proceedings taken or prosecutions commenced as is in accordance with the law laid down in this judgment.

We declare the portion of clause (*d*) of section 3 indicated above and section 8 unconstitutional and direct therefore that a writ of *mandamus* shall issue directing the respondents to return the goods seized. As the petitioners' challenge to the constitutionality of the Act is partially successful the proper order as to costs is that the parties do pay their own costs.

Petition partly allowed.

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1. (1957) S.C.J. 593 : (1957) 2 An.W.R. (S.C.) 76 : (1957) 2 M.L.J. (S.C.) 76 : (1957) M.L.J. (Cr.) 547 : (1957) S.C.R. 930, 936.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Mineral Development, Limited .. *Petitioners**

v.

The State of Bihar and another .. *Respondents.*

Bihar Mica Act (1947), *section* 25 (1) (*c*)—*Vires—Cancellation of licence for some technical non-compliance of Rules and without giving reasonable opportunity to show cause against the action—Revenue Minister biased against petitioner because of political rivalry—Effect—Cancellation not sustainable.*

Administrative action—Bias on part of Minister heading the department—Effect.

The power given to the State Government under section 25 of the Bihar Mica Act is only to achieve the objects of the Act, *i.e.* to enforce the said provisions which have been enacted in the interest of the public and that power is exercisable on the basis of objective tests and in accordance with principles of natural justice.

A licence under the Bihar Mica Act affecting interests of great magnitude was cancelled by the State Government. The enquiry was held by the department headed by the Minister who was obviously biased against the licencee. Some technical non-compliance of the Rules, alleged to have been discovered during the inspection of certain godowns were given as an excuse to withdraw the licence ; no opportunity was given to the licensee to inspect its accounts (which had been taken away by the department at the inspection of the godowns) and explain the alleged defaults with reference to the accounts given.

After the licencee gave his reply, a sense of false security was created in the licencee and after a period of two years the Government issued the notification cancelling the licence. The State also filed a suit against the lessor for a declaration that the lease was benami and for other reliefs. The proceedings were started because of political rivalry between the lessor and the Revenue Minister who assumed that the licencee of lessors was benamidar and the order of cancellation was made by the Revenue Minister, who was behind the enquiry. In the circumstances :

Held, under section 25 (1) (*c*) of the Bihar Mica Act *repeated failure* to comply with any of the provisions of the Act is a necessary condition for the cancellation of a licence. The result of one continuous inspection cannot be the basis for holding that the licensee was guilty of the "repeated failure" within the meaning of section 25 (i) (*c*). Accordingly the State has no power to take action under section 25 (1) (*c*) of the Act. Further the State Government has afforded no opportunity to the licencee within the meaning of the second proviso to section 25 (1).

It is the duty of the Court to ascertain in each case having regard to the over-all picture before it, to come to a conclusion whether reasonable opportunity was given to a person " to show cause" within the meaning of the second proviso to section 25 (1) of the Act. Tribunals or authorities who are entrusted with quasi-judicial functions are as much bound by the relevant principles governing the " doctrine of bias " as any other Tribunal.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

N. C. Chatterjee, Senior Advocate (*D. N. Mukherjee*, Advocate, with him) for the Petitioners.

Mahabir Prasad, Advocate-General for the State of Bihar (*Bajrang Sahai* and *R. C. Prasad*, Advocates, with him) for the Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This petition under Article 32 of the Constitution is filed by the Mineral Development, Limited, against the State of Bihar and another for the issue of writ of *certiorari* to quash the order of the Government of Bihar, dated September 7, 1955, cancelling the petitioner's licence and for the issue of a writ of *mandamus* directing them to forbear from giving effect to the said order of cancellation.

One Raja Bahadur Kamakshya Narain Singh (hereinafter called the proprietor) was the proprietor of Ramgarh and Serampur estates in the district of

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* Petition No. 159 of 1956. 15th December, 1959.

Hazaribagh in the State of Bihar. On December 29, 1947, the said Proprietor executed a mining lease in favour of the Mineral Development, Limited (hereinafter called the Company) for all minerals in respect of 3026 villages for a period of 999 years. On or about 3rd January, 1951, the Deputy Commissioner, Hazaribagh, granted the Company a licence bearing No. H.L. 261-H in Form 'B' under section 6 of the Bihar Mica Act, 1947, hereinafter ca led the Act, for mining mica. The licence was renewed from year to year by the relevant authority and the last of the renewals expired on 31st December, 1954. The Secretary to the Government of Bihar in the Revenue Department issued a notice, dated March 7, 1953, to the Company charging it with violations of sections 10, 12 and 14 of the Act and calling upon it to show cause within 15 days of the receipt of the said notice why action should not be taken to cancel the licence issued in favour of the Company. By letter, dated 20th March, 1953, the Company requested the Secretary to the Government, Revenue Department, Bihar, to furnish the Company with particulars of the alleged violations of the provisions of the Act. After a reminder was sent, the Company was furnished by the Government with the particulars by its letter, dated May 1, 1953. On or about May 17, 1953, the company sent a written representation to the Government denying the allegations made against it and explaining how the Company complied with the provisions of the Act. After this letter, no further correspondence passed between the Government and the Company. But on September 7, 1955, *i.e.*, two years after the said representation, the Government issued a notification cancelling the Company's licence No. 261-H of 1951. The result of this notification was that the Company was prevented from carrying on the mining operations in large tracts of land it had taken on lease from the said proprietor.

The Company in its petition has stated that it had invested a large sum of about Rs. 16 lakhs to obtain the mining lease and spent a considerable sum in prospecting and developing the mines, that by the arbitrary act of the Government it could not work the mines, that a large number of labourers had been thrown out of employment and that in the result it was being put to heavy loss. It has filed the present petition for the reliefs mentioned already for the reasons, among others that the Government acted illegally and with *mala fides* and infringed the funda, mental rights of the petitioner under Article 19 (1), sub-clauses (*f*) and (*g*), of the Constitution. The first respondent to the petition is the State of Bihar and the second respondent is the Additional Secretary to the Government of Bihar in the Revenue Department. They filed a counter denying the allegations made against the Government and particularly stated that they had acted within their rights and cancelled the licence in strict compliance with the provisions of the Act.

The arguments of Mr. Chatterjee, learned counsel for the petitioner, may be broadly formulated under the following four heads : (i) The Bihar Mica Act, 1947, as amended by the Bihar Mica (Amendment) Act, 1949, is *ultra vires* for want of constitutional competence ; (ii) the provisions of the Act are repugnant to the provisions of the Central Act LIII of 1948, and, therefore, to the extent of such repugnancy the former Act should yield to the latter Act, with the result that the licensing provisions under the Act ceased to have any legal effect ; (iii) the petitioner has the fundamental rights under Article 19 (1) (*f*) and (*g*) of the Constitution to acquire, hold and dispose of his property and to carry on any occupation, trade or business in respect thereof, and that the provisions of section 25 (1) (*c*) of the Act operate as an unreasonable restriction on the said rights, and are therefore void ; and (iv) even if the said section did not infringe his fundamental rights, the order of the Government in cancelling the lease without affording him reasonable opportunity to show cause within the meaning of the second proviso to that section infringed his fundamental right.

The first two contentions need not detain us ; for, the petition may be disposed of on the basis of the last two contentions.

The first question, therefore, is whether the provisions of section 25 of the Act infringe the fundamental rights of the petitioner under sub-clauses (*f*) and (*g*) of Article 19 of the Constitution. The said provisions of the Constitution read :

Article 19: (1) All citizens shall have the rights—

....

(*f*) to acquire, hold and dispose of property ; and

(*g*) to practise any profession, or to carry on any occupation, trade or business."

Under sub-clauses (*f*) and (*g*) of Article 19 (1), every citizen has the right to acquire, hold and dispose of property, and to practise any profession, or to carry on any occupation, trade or business. But clauses (5) and (6) of Article 19 authorize the State to make a law imposing restrictions in the interest of the general public, but the restrictions so imposed must be reasonable. The concept of reasonableness has been clearly explained by Patanjali Sastri, C.J., in *State of Madras* v. *V. G. Row*[1] as under :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

These observations, if we may say so with great respect, lay down the correct principle. It follows that it is the duty of this Court to decide, having regard to the aforesaid considerations and such others whether a particular statute satisfies the objective test of "reasonableness." While not disputing the general principle, the learned counsel for the petitioner strongly relied upon the decision of this Court in *Thakur Raghubir Singh* v. *Court of Wards, Ajmer*[2] in support of his contentions. The facts in that case were : section 112 of the Ajmer Tenancy and Land Records Act (XLII of 1950) provided that

"if a landlord habitually infringes the rights of a tenant under this Act, he shall, notwithstanding anything in section 7 of the Ajmer Government Wards Regulation, 1888 (I of 1888) be deemed to be a 'landlord who is disqualified to manage his own property within the meaning of section 6 of the said Regulation and his property shall be liable to be taken under the superintendence of the Court of Wards."

The determination of the question whether a landlord had habitually infringed the rights of his tenants was left to the Court of Wards. The petitioner whose estate was taken over by the Court of Wards questioned the validity of the power conferred on the Court of Wards. This Court held that the said section was void as being an unreasonable restriction on the right in property as the restriction made the enjoyment of that right depend upon the mere discretion of the executive. Mahajan, J., as he then was, observed :

"When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can, on no construction of the word "reasonable" be described as coming within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a civil Court."

In that case the combined operation of section 112 of Act XLII of 1950 and the provisions of Regulation I of 1888 was that the Court of Wards could in its own discretion and on its own subjective determination assume superintendence of the property of a landlord who habitually infringed the rights of his tenants. The Act also did not provide any machinery for determining the question whether a certain landlord was a person who habitually infringed the rights of his tenants. Even the condition precedent for the assumption of superintendence by the Court of Wards, *viz.*, the previous sanction of the Chief Commissioner, was also a matter entirely resting on his discretion. It will be seen that under that Act the entire

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1. (1952) S.C.J. 253 : (1952) 2 M.L.J. 135 : (1952) S.C.R. 597, 607.

2. (1953) S.C.J. 505 : 1953 S.C.R. 1049, 1055.

question was left to the unbridled discretion of the executive without providing for any machinery to ascertain the grounds for its action. That decision cannot apply to the facts of the present case as they differ in material respects from those considered by this Court in that decision.

The short question, therefore, is whether section 25 of the Act places unreasonable restrictions on the petitioner's fundamental rights under Article 19 (1) (*f*) and (*g*) of the Constitution. It is conceded that the State can make a law imposing restrictions, in the interest of the public, on citizens in respect of their enjoyment of mineral rights ; but the complaint is that the law which enables the State in its uncontrolled discretion to prevent the owner or the lessee of such a field from enjoying his land or leasehold interest or to carry on his mining operations permanently or for an indefinite period is unreasonable. So stated there is plausibility in the argument. But let us look at the law more closely to ascertain whether it suffers from such a vice.

The Act was passed in the year 1947 and was amended from time to time. The declared object of the Act is " to regulate the possession and transport of, and trading in, mica in the Province of Bihar ". It was necessitated, presumably, because of the scarcity of mica and its importance in the industrial field, and for that reason for regulating home consumption and foreign export. The learned counsel for the petitioner did not controvert the position, and indeed conceded that reasonable restrictions can legitimately be imposed on the mining operations of the petitioner. Section 4 of the Act imposes a prohibition on the possession of, and trading in, mica without licence, proprietor's certificate, or digger's permit. Sections 5 and 6 prescribe a machinery for granting proprietor's certificate, and miner's or dealer's licence. Sections 10 to 12 define the duties of licensees and registered proprietors in the matter of keeping accounts and producing them for inspection. Section 14 prohibits the removal of mica from one place to another without a pass. Sections 17, 19 and 21-A impose penalties for the infringement of the provisions of the Act and the Rules made thereunder. Sections 22 to 24 deal with miscellaneous matters, such as the power of a police officer to arrest without warrant persons guilty of an offence under this Act, to search, seize and detain mica removed without a pass, etc. Then comes section 25. As the main argument of the learned counsel turns upon the provisions of section 25, it is necessary to read the entire section, which is as follows :

Section 25: " (1) The State Government may cancel the licence or proprietor's certificate of any licensee or registered proprietor who—

(*a*) allows his license or proprietor's certificate, as the case may be, to be used on behalf of any other person as authority to buy or have in his possession or sell mica extracted from a mica mine or from a mica dump, or

(*b*) being a person to whom a miner's license has been granted extracts mica from a mine the particulars of which are not endorsed on his license, or

(*c*) is guilty of repeated failure to comply with any of the other provisions of this Act or Rules made thereunder, or

(*d*) is convicted of an offence under Chapter XVII of the Indian Penal Code committed in respect of mica ;

Provided that a license or a proprietor's certificate shall not be cancelled solely by reason of conviction from which the licensee or the registered proprietor has no right of appeal or revision :

Provided further that a license or a proprietor's certificate shall not be cancelled unless the licensee or the proprietor has been furnished with the grounds for such cancellation and has been afforded reasonable opportunity to show cause why his license shall not be cancelled.

(2) A fresh license or proprietor's certificate shall not, without the previous sanction of the State Government, be granted to any licensee or registered proprietor whose license or proprietor's certificate has been cancelled under this section."

This section embodies the severest punishment that can be imposed under the Act on a licensee or a proprietor. It enables the State Government to cancel the licence. The power is entrusted to the highest executive in the State which ordinarily can be relied upon to discharge its duties honestly, impartially and in the

interest of the public without any extraneous considerations. The section provides clearly ascertainable standards for the State Government to apply to the facts of each case. Clauses (*a*), (*b*), (*c*) and (*d*) of section 25 (1) describe with sufficient particularity the nature of the defaults to be committed and the abuses to be guilty of by the licensee in order to attract the penal provisions. Clause (*c*) with which we are directly concerned embodies the last step that can be resorted to by the State Government to eliminate the recalcitrant operator from the field of mining industry if only he is guilty of repeated failures to comply with any of the provisions of the Act or the Rules made thereunder other than those mentioned in the other clauses of the section. The discretion of the State Government under clause (*c*) of section 25 (1) is hedged in by two important restrictions : *viz.*, (i) the failure to comply with the provisions of the Act or the Rules made thereunder, should be a repeated failure and not a mere sporadic one *i.e.*, the defaulter must be a recalcitrant one ; (ii) before cancelling the licence the State Government should afford reasonable opportunity to the licensee to show cause why his licence should not be cancelled. That apart, the cancellation of the licence has not the effect of barring the licensee or the proprietor from applying for a fresh licence. The only condition imposed is that a fresh licence shall not be granted to him without the previous sanction of the State Government. In the foregoing circumstances, can it be said that the section imposes an unreasonable restriction on the petitioner's fundamental rights ? The statutory conditions subject to which the licence is given are, obviously, reasonable and necessary for regulating the mining industry. The provisions of the Act, as we have already pointed out, were only designed to compel a licensee to keep accounts, produce them before the authorities when required, to prevent him from removing mica from the fields without passes and to impose penalties for contravening the Rules. The only vice is said to lie in the power to cancel a licence conferred on the State Government under section 25 of the Act. The power given to the State Government is only to achieve the object of the Act *i.e.*, to enforce the said provisions, which have been enacted in the interest of the public ; and that power, as we have indicated, is exercisable on the basis of objective tests and in accordance with the principles of natural justice. We cannot, therefore, hold that section 25 (1) (*c*) of the Act imposes an unreasonable restriction on the petitioner's fundamental rights under Article 19 (1) (*f*) and (*g*) of the Constitution.

Before leaving this part of the case, we must make it clear that we do not intend to lay down as a proposition that whenever discretionary power is conferred on a State Government or the Union Government by law, the said law must necessarily operate as a reasonable restriction on a fundamental right. Such a general proposition negatives the concept of fundamental rights for the simple reason that fundamental rights are guaranteed against State action. Therefore, the conferment of such a power on the State Government and not upon a subordinate officer is only one of the considerations that may enter into the judicial verdict on the reasonableness of a particular law and the reasonableness of that law falls to be decided only on the cumulative effect of the circumstances under which such power is conferred.

The next question is, did the State Government comply with the provisions of section 25 (1) (*c*), read with the second proviso thereto, of the Act ? Under the said proviso the State Government can cancel a licence after affording reasonable opportunity to the licensee to show cause why his licence should not be cancelled. This proviso confers a quasi-judicial power on the State Government. The concept of "reasonable opportunity" is an elastic one and is not susceptible of easy and precise definition. The decisions on cases under Article 311 of the Constitution afford illustrations of the applications of the said doctrine to varying situations. What is reasonable opportunity under one set of circumstances need not be reasonable under different circumstances. It is the duty of the Court to ascertain in each case, having regard to the overall picture before it, to come to a conclusion whether reasonable opportunity is given to a person "to show cause" within the meaning of the second proviso to section 25 (1) of the Act. Tribunals or authorities who are entrusted with quasi-judicial functions are as much bound by the relevant principles

governing the "doctrine of bias" as any other judicial tribunal. This Court in a recent decision in *Gullapalli Nageswara Rao* v. *The State of Andhra Pradesh*[1] observed :

"The principles governing the "doctrine of bias" vis-a-vis judicial tribunals are well-settled and they are : (i) no man shall be a Judge in his own cause ; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal", and that "any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a Judge, and any interest, though not pecuniary, will have the same effect, if it is sufficiently substantial to create a reasonable suspicion of bias". The said principles are equally applicable to authorities, though they are not Courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others, *i.e.*, authorities who are empowered to discharge quasi-judicial functions."

In view of the foregoing principles the first question to be considered is whether in the present case the authority functioning for the State Government—it is admitted that the then Revenue Minister of the State made the impugned order—had personal bias against the petitioner. Secondly, we will have to scrutinize the record to ascertain whether reasonable opportunity was given to the petitioner to show cause or whether it was denied that right. Thirdly, we will have to ascertain whether the State Government found that the petitioner was guilty of repeated failure to comply with any of the other provisions of the Act or the Rules made thereunder and cancelled the licence on the basis of that finding. It may be mentioned that the learned Advocate-General, who appeared before us on behalf of the State, submitted that the State Government exercised its power under section 25 (1) (*c*) of the Act.

The notice to show cause was issued by the State Government to the petitioner on 7th March, 1953. The licence granted in favour of the petitioner was cancelled by the State Government by its notification dated 1st September, 1955. Admittedly, during this period Sri Krishna Ballav Sahay was the Revenue Minister of the Government of Bihar, and he was in charge of the department dealing with mines. There was political rivalry between the said Minister and Sri Raja Bahadur Kamakshya Narain Singh, the ex-landlord of Ramgarh and Serampur estates in the district of Hazaribagh, who leased the lands in question to the petitioner. The case of the State is that the said lease was benami only for the said proprietor and the case of the petitioner is that the wife of the proprietor, Rani Lalita Rajya Luxmi Devi, is the registered shareholder of the Company. The question whether the case is only benami for the proprietor or not is now in dispute in Title Suit No. 53 of 1954 pending on the file of the Court of the Subordinate Judge, Hazaribagh. We shall, therefore, assume for the purpose of this case that there is a dispute on the question of title, the State Government asserting that the lease is only benami for the proprietor and the petitioner claiming to be the real lessee and the wife of the proprietor only a registered shareholder of the Company. Whichever version is true, the proprietor, directly or because of his wife, is very much interested in the Company, at any rate, the Government's case is that he is the owner. It is alleged in the petition that the said proprietor opposed the Revenue Minister in the general election held in 1952, to the Bihar Legislative Assembly in the constituency of Giridih and Barkagaon and defeated him. It is also stated that before the said election, the Revenue Minister filed a criminal case against the proprietor in the District Court of Hazaribagh charging him under section 500 of the Indian Penal Code. The High Court in a judgment dated 15th April, 1952, delivered in the petition to transfer the said case to some other Court recorded the admitted fact that there was political rivalry between the Minister and the proprietor. Ultimately, this Court transferred the said criminal case from the State of Bihar to the file of a Magistrate's Court in Delhi on the ground that there was political rivalry between the two persons. These facts are not denied in the counter-affidavit filed by the State. In the said counter-affidavit the following cryptic statement occurs :

1. Civil Appeals Nos. 198 to 200 of 1959. Since reported (1960) S.C.J. 53 :(1960) 1 M.L.J. (S.C.) 13 : (1960) 1 An.W.R. (S.C.) 13.

"That the allegations in paragraph 14 (*b*) of the petition about the alleged political rivalry between Sri Kamakshya Narain Singh and Sri Krishna Ballav Sahay, the then Minister, Revenue, has no bearing on the facts of this case so far as the orders of the Government are concerned and to that extent the allegations are denied."

It may, therefore, be taken that the allegations of personal bias of the Revenue Minister against the proprietor is not denied. It is also not disputed that the proceedings against the petitioner were started during the tenure of the said Revenue Minister and that the actual order of cancellation was made by him. We have no hesitation in holding that the Revenue Minister had personal bias against the proprietor and that he was also acting on the belief that the lease was only benami for the said proprietor. We, therefore, hold that the said Revenue Minister had personal bias within the meaning of the decisions and he should not have taken part in either initiating the enquiry or in cancelling the licence.

On the basis that section 25 of the Act is constitutionally valid, the question is whether the provisions of that section have been complied with in the present case. If they were not complied with, the order of the State Government made in derogation of the said provisions would certainly infringe the fundamental rights of the petitioner. The main objection to the validity of the impugned oreder is that the State Government did not afford the petitioner reasonable opportunity to show cause why his licence should not be cancelled. The subject-matter of the mining leasehold interest is in respect of 3026 villages for a period of 999 years. It is alleged in the petition that a large amount of about Rs. 16 lakhs were spent by the petitioner to obtain the mining lease and in addition a considerable sum was spent in prospecting and developing the mines. On 7th March, 1953, the Government of Bihar through its Secretary in the Revenue Department issued a notice to the petitioner asking it to show cause within 15 days of the receipt of the said notice why action to cancel the miner's licence No. 261-H under section 25 (1) (*c*) of the Act should not be taken by the Government. It is stated in the notice that the petitioner committed

"violations of sections 10, 12 and 14 in respect of their mica godowns at Marhand and Sultana sections 10 and 12 in respect of the godowns at Simaria and section 10 in respect of Kowabar godowns and have thus been guilty of repeated failures to comply with these provisions of the Bihar Mica Act, 1947".

On receipt of this notice the petitioner by its letter dated 20th March, 1953, asked the Government to furnish it with particulars of the allegations contained in the said notice and on 27th March, 1953, renewed its request for the said particulars. On 1st May, 1953, the Government sent a Memorandum No. A/MI-8022/53-R. to the petitioner Company giving the particulars of the violations of the provisions of the Act. The subject of the Memorandum is described as "Repeated failure to comply with the provisions of the Bihar Mica Act, 1947". The particulars show that between 3rd December, 1952 and 11th December, 1952, the Inspector of Mica Accounts inspected different godowns of the petitioner and found contravention of the provisions of sections 10, 12 and 14 of the Act. What is important to notice is that the inspection, though spread over a few days, was really one inspection of different godowns and the particulars disclosed were comparatively trivial defaults in carrying out the provisions of the Act. It may also be noticed that one of the particulars related to an inspection alleged to have been made on 6th March, 1952; and in respect of that inspection the petitioner was prosecuted and convicted, but the licence was renewed for the next two years in spite of the said conviction. The result of that inspection is, therefore, not germane to the enquiry initiated by the notice dated 7th March, 1953. After giving the particulars the memorandum concludes "it is clear that the Company has been guilty of repeated failure to comply with the provisions of the Bihar Mica Act, 1947" and on these allegations the Company was directed to show cause why the licence should not be cancelled under section 25 (1) (*b*) of the Act. Section 25 (1) (*b*) says that the State Government may cancel the licence of any licensee who "being a person to whom a miner's licence has been granted extracts mica from a mine the particulars of which are not endorsed on his license." It is admitted by the

learned Advocate-General that the Government did not take action under clause (*b*) of section 25 (1) and that the mention of that clause in the memorandum was only a mistake for clause (*c*) of section 25 (1) of the Act. On 17th May, 1953, the petitioner submitted to the Government a detailed explanation in regard to the charges levelled against it. It premised its explanation with the statement that all the relevant books of accounts and stock books had been seized by the Inspector of Mica Accounts and had not been returned in spite of repeated requests and that therefore it reserved its right to make further submissions when the books were returned. It also pointed out that at the time of inspection it was not asked to explain the alleged irregularity in accordance with the usual procedure in regard to such matters. It then proceeded to answer every one of the allegations made against it. The explanation given by the Company appears to be plausible and the contraventions alleged, even if true, appear to be too trivial for the drastic action taken by the State. In 1954 the Government filed a suit against the said proprietor for a declaration that the various companies brought into existence by him were bogus ones and the various transactions entered into by him were all benami for him. After the explanation given by the petitioner, there was a lull for more than two years. The State Government neither returned the account books nor invited the petitioner to make further submissions by allowing it to look into the accounts seized by the authorities concerned. Suddenly, on 7th September, 1955, a notification was issued to the effect that the Governor of Bihar was pleased to cancel the petitioner's licence. It was also directed to stop operating the mica mines forthwith and to produce the books of account relating to the above mines in respect of their godowns on 12th September, 1955.

From the foregoing narration of facts it is obvious that the licence affecting rights of great magnitude was cancelled, to say the least, for trivial reasons. The enquiry was held by the department headed by the Minister who was obviously biased against the petitioner. Some technical non-compliances of the Rules alleged to have been discovered during the inspection of certain godowns were given as an excuse to withdraw the licence ; no opportunity was given to the petitioner to inspect its accounts and to explain the alleged defaults with reference to the accounts. After the petitioner gave its reply, a sense of false security was created in the petitioner and after a period of two years the Government issued the notification cancelling the licence. Meanwhile, as a second string to the bow, the State filed a suit against the proprietor for a declaration that the lease was benami and for other reliefs. The hidden hand of the Revenue Minister can be seen in this enquiry. The proceedings were started because of political rivalry between the proprietor and the Revenue Minister. Though high stakes were involved, the enquiry was conducted in a manner which did not give any real opportunity to the petitioner to explain its conduct and to disprove the allegations made against it ; and the order of cancellation of the licence was made admittedly by the same Revenue Minister, who was behind the enquiry. In the circumstances, we must hold that no reasonable opportunity was given to the petitioner within the meaning of the second proviso to section 25 (1) of the Act.

That apart, the State Government did not find on the material that the petitioner was guilty of repeated failure to comply with any of the provisions of the Act. The particulars furnished by the Government did not disclose any such repeated failure. Under section 25 (1) (*c*) of the Act, repeated failure to comply with any of the provisions of the Act is a necessary condition for the cancellation of a licence. Unless there is repeated failure within the meaning of that clause the State Government has no power to cancel the licence under the said clause. That apart, neither in the notice initiating the proceedings nor in the notification cancelling the licence issued by the Government it was stated that the petitioner was guilty of " repeated failure " within the meaning of the said clause. But in the particulars furnished, the State Government alleged that the petitioner had been guilty of repeated failure to comply with the provisions of the Act, but the particulars did not support that statement, for, apart from the default of March, 1952, the alleged contravention of Rules were discovered by the Inspector of Mica Accounts only during the inspection

SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT :—B. P. SINHA *Chief Justice*; S.J. IMAM, A.K. SARKAR, K.N. WANCHOO AND J. C. SHAH, JJ.

Sahibzada Saiyed Muhammed Amirabbas Abbasi and others .. *Petitioners.**

v.

The State of Madhya Bharat (now Madhya Pradesh) and others .. *Respondents.*

Constitution of India (1950), *Article* 32—*Scope of petition under and extent of powers to issue directions.*

The Supreme Court has power under Article 32 of the Constitution to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* whichever may be appropriate for the enforcement of any of the fundamental rights. The relief claimed by the first petitioner in the instant case for assessing the liability of the respondents (the State Government) and Court guardian of minor petitioners 2 and 3 on the plea that they have either misappropriated the estate or by negligence caused loss to the estate of the minors, may be obtained in a properly constituted suit and not in a petition under Article 32 of the Constitution. The property to which the minors are or may be entitled may be ascertained in a proceeding under the Guardians and Wards Act or in a suit in the civil Court and not in a petition under Article 32 of the Constitution.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Pandit Nanak Chand, Advocate for Petitioners.

I. N. Shroff, Advocate for Respondent No. 1.

The Judgment of the Court was delivered by

Shah, J.—This is a petition filed by Sahibzada Saiyed Muhammed Amirabbas Abbasi, who will hereinafter be referred to as the first petitioner on behalf of himself and as the natural guardian of his two minor children, Kamal Abbas and Jehanzeb Bano, petitioners Nos. 2 and 3 against the State of Madhya Bharat (now the State of Madhya Pradesh) and three other respondents for an appropriate writ or writs of *habeas corpus, mandamus, certiorari,* prohibition and any other writ, direction or order directing the State of Madhya Bharat immediately to assume charge of the properties of the minor petitioners 2 and 3 and determining the amount of loss sustained by the minors and calling upon the State of Madhya Bharat and the other respondents to compensate the minors for the full value of the property lost due to their negligence in the discharge of their respective duties in failing to protect the minors' properties and calling upon the 4th respondent to produce the minors before this Court and directing that the minors be handed over to the custody of some relation who is competent under the personal law to have their custody, and calling upon the Chief Secretary of the State of Madhya Bharat to furnish full particulars of the trust property released in favour of the second respondent and directing the first respondent to produce in this Court the box of jewellery entrusted to it with full particulars regarding its custody from March 29, 1948, and ascertaining whether the contents have been misappropriated and further ascertaining the loss, if any, occasioned to the minor petitioners and its quantum and declaring liability of the respondents in that behalf and for further relief which the Court may award in the circumstances of the case, as just and proper.

Prima facie, the reliefs claimed are not within the scope of a petition for a writ under Article 32 of the Constitution. This Court has power under that Article to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* whichever may be appropriate for the enforcement of any of the fundamental rights ; but by this petition, the first petitioner claims on the plea that the respondents have misappropriated or misapplied the property of petitioners 2 and 3, a writ or writs directing that loss sustained by the minors be ascertained and made good and also asks this Court to provide for the custody of the minors according to their personal law.

* Petition No. 217 of 1956. 26th February, 1960.

The facts which give rise to the petition are these :—

The first petitioner married in 1940 one Naiyar Jahan Begam and by her he had two children—petitioners 2 and 3. Naiyar Jahan Begam died in the year 1943 and petitioners 2 and 3 were thereafter looked after by Musharraf Jahan Begam, mother of Naiyar Jahan Begam. From her father Naiyar Jahan Begam had inherited certain valuable property and from her mother, Musharraf Jahan Begam, she had received a dowry of substantial value at the time of her marriage. Before she died on March 6, 1949, Musharraf Jehan Begam had made a trust in respect of certain property for the benefit of petitioners 2 and 3. The first petitioner had after the death of Naiyar Jehan Begam contracted a second marriage and of that marriage there were three children. During the life of Musharraf Jehan Begam the first petitioner took no interest in petitioners 2 and 3 and at sometime in the year 1948, he migrated to West Pakistan and took up residence in Rawalpindi. After the death of Musharraf Jehan Begam, the first petitioner applied to the Madhya Bharat High Court for a writ in the nature of *habeas corpus* for a direction to produce petitioners 2 and 3 before the Court on the allegation that the latter were wrongfully detained. The High Court refused to give the direction and ordered that the first petitioner might, if so advised, apply under the Guardians and Wards Act for appropriate relief. The first petitioner then applied to the Court of the District Judge at Ratlam for an order that he be appointed a guardian of the person and property of petitioners 2 and 3. On November 23, 1949, the second respondent, Sultan Hamid Khan, cousin of Musharraf Jehan Begam applied that he be appointed guardian of the person and property of petitioners 2 and 3 and by order, dated December 5, 1949, the District Court appointed him guardian and rejected the application filed by the first petitioner. Against the order passed by the District Court, Ratlam, Appeal No. 20 of 1950 was filed in the High Court of Madhya Bharat. This appeal was dismissed on March 29, 1954. An application for Special Leave to appeal to this Court under Article 136 against that order of the High Court was rejected on November 12, 1956.

The first petitioner had, in the meantime, applied to this Court under Article 32 of the Constitution for the reliefs which have already been set out. To this petition, petitioners 2 and 3 were impleaded as party petitioners, the first petitioner alleging that he was their natural guardian and next friend. Evidently, the first petitioner could not claim to be the next friend of the minor petitioners 2 and 3, a guardian of their person and property having been appointed by the District Court, Ratlam, unless this Court for reasons to be recorded deemed it to be for the welfare of the minors that the first petitioner be permitted to act or be appointed as the case may be (*vide* Order 32, rule 4 of the Code of Civil Procedure). The first petitioner did not obtain any order of this Court permitting him to act as the next friend of petitioners 2 and 3 notwithstanding the order passed by the District Court appointing respondent No. 2 as their guardian.

The petition filed by the first petitioner is a somewhat prolix document. The first petitioner claimed that the interest of the second respondent who was appointed a guardian by the District Court was adverse to the interests of the minors, and that the latter was, in any event, unfit to be appointed a guardian of the minors, that the second respondent had misappropriated the property of the minors and that he was not looking after the minors and was acting contrary to their interests and that proceedings in the District Court were vitiated on 'account of partiality and collusion' and by reason of deliberate violation of the order passed by the High Court. The petitioner also claimed that the State of Madhya Bharat was bound to take steps to protect the entire property of the minor petitioners 2 and 3, but the first respondent had neglected to do so and had thereby rendered itself liable to make good the loss.

On these allegations, the first petitioner submitted that the minor petitioners were deprived of the equal protection of the laws in force including the Personal Law and were accordingly discriminated against and their property was, by reason of such discrimination in serious danger of being wasted or misappropriated. He

also submitted that he could not be denied his rights under the personal law governing the minors as their natural guardian, merely because he had acquired a foreign domicile.

Exercising jurisdiction under Article 32 of the Constitution, this Court may grant relief for enforcement, only of the rights conferred by Part III of the Constitution. The alleged right of the first petitioner to guardianship of his minor children under the personal law is not one of the fundamental rights guaranteed to him by the Constitution ; nor by appointing respondent No. 2 as the guardian of the minors under the Guardians and Wards Act is discrimination practised against the minors. The second respondent was appointed guardian of the minors by order of a competent Court, and denial of equality before the law or the equal protection of the laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress a superior tribunal, if there be one. In the present case, against the order of the District Court appointing the second respondent the guardian of the person and property of the minors, an appeal was preferred to the High Court and that appeal was dismissed. Even an application for Special Leave to appeal to this Court was rejected, and the order of the District Court became final. If, since the date on which the order appointing the guardian of the minors, events have transpired which necessitate a modification of that order the proper remedy of the first petitioner is to apply to the District Court for relief in that behalf and not to approach this Court for a writ under Article 32 of the Constitution. This Court has rejected the application for Special Leave to appeal under Article 136; and that order cannot be circumvented by resorting to an application for a writ under Article 32. Relief under Article 32 for enforcement of a right conferred by Chapter III can be granted only on proof of that right and infringement thereof, and if, by the adjudication by a Court of competent jurisdiction the right claimed had been negatived, a petition to this Court under Article 32 of the Constitution for enforcement of that right, notwithstanding the adjudication of the civil Court, cannot be entertained.

The relief claimed by the first petitioner for assessing the liability of the respondents on the plea that they have either misappropriated the estate or by negligence caused loss to the estate of the minors, may be obtained in a properly constituted suit and not in a petition under Article 32 of the Constitution. The property to which the minors are or may be entitled may be ascertained in a proceeding under the Guardians and Wards Act or in a suit in the civil Court and not in a petition under Article 32 of the Constitution.

In our judgment, the petition is wholly misconceived and must be dismissed with costs payable by the first petitioner personally.

Petition dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. J. IMAM, A. K. SARKAR, K. N. WANCHOO AND J. C. SHAH, JJ.

Balwan Singh .. *Appellant**

v.

Lakshmi Narain and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), sections 83 and 123 (5)—Election petition alleging corrupt practice of "hiring or procuring vehicles by a candidate or his agent"—Particulars—Sufficiency—Practice—Dismissal of petition—Propriety—Procedure.

Constitution of India (1950), Article 136 (1)—Appeal by Special Leave—Scope.

Shah, J.—(delivering the majority judgment). Not the contract of hiring but the fact of hiring for conveying voters to and from the polling station is declared by section 123 (5) of the Representation of the People Act a corrupt practice. A petition which sets forth the particulars about the use of a

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* C.A. No. 411 of 1959. 23rd February, 1960.

vehicle for conveying voters to and from the polling station, with details as to the time and place coupled with as full a statement as possible in support of the plea that the vehicle was hired or procured by the candidate or his agent or another person substantially complies with the requirement of section 83 (1) (*b*) of the Act. The corrupt practice being the hiring or procuring of a vehicle for the conveyance of the electors, if full particulars of conveying by a vehicle of electors to or from any polling station are given, section 83 is duly complied with, even if particulars of the contract of hiring, as distinguished from the fact of hiring are not given. Failure to set out particulars of the contract of hiring or arrangement of procuring will not render the petition defective.

The practice to be followed in cases where insufficient particulars of a corrupt practice are set forth in an election petition is this. An election petition is not liable to be dismissed *in limine* merely because full particulars of a corrupt practice alleged in the petition, are not set out. Where an objection is raised by the respondent that a petition is defective because full particulars of an alleged corrupt practice are not set out, the Tribunal is bound to decide whether the objection is well founded. If the Tribunal upholds the objection, it should give an opportunity to the petitioner to apply for leave to amend or amplify the particulars of the corrupt practice alleged ; and in the event of non-compliance with that order the Tribunal may strike out the charges which remain vague. Insistence upon full particulars of corrupt practices is undoubtedly of paramount importance in the trial of an election petition, but if the parties go to trial despite the absence of full particulars of the corrupt practice alleged, and evidence of the contesting parties is led on the plea raised by the petition, the petition cannot thereafter be dismissed for want of particulars, because the defect is one of procedure and not one of jurisdiction of the Tribunal to adjudicate upon the plea in the absence of particulars. The appellate Court may be justified in setting aside the judgment of the Tribunal if it is satisfied that by reason of the absence of full particulars, material prejudice has resulted ; and in considering whether material prejudice has resulted failure to raise and press the objection about the absence of particulars before going to trial must be given due weight.

Merely because an appeal has been admitted by Special Leave, the entire case is not at large, and the appellant is not free to contest the findings of fact of the subordinate tribunals. Only those points on which Special Leave may initially be granted, can be urged at the final hearing ; and normally, Special Leave will not be granted by the Supreme Court under Article 136 (1) of the Constitution on a plea of error committed by the Courts below in the appreciation of evidence.

Per *Sarkar, J.*—" It is of the essence of this corrupt practice that the vehicle must have been hired, that is to say, a contract for the hiring of the vehicle must have been made. A vehicle cannot be hired without a contract. Therefore particulars of that contract should be given." There is no corrupt practice unless the contract of hire is established.

Appeal by Special Leave from the Judgment and Order, dated the 9th January, 1959, of the Allahabad High Court in First Appeal No. 448/A of 1958.

L. K. Jha, Senior Advocate, (*P. Ram Reddy, R. K. Garg* and *R. Patnaik*, Advocates, with him), for Appellant.

G. S. Pathak, Senior Advocate, (*G. N. Dikshit, Udai Pratap Singh, J. P. Goyal, M. S. Gupta* and *P. C. Aggarwala*, Advocates, with him), for Respondent No. 1.

The Court delivered the following Judgments.

Shah, J. (for the majority).—Three candidates, Balwan Singh (hereinafter referred to as the appellant), Ram Dulari and Gaya Prasad, contested the election to the U.P. Legislative Assembly from the Akbarpur Rural Assembly Constituency No. 6, at the last general elections held in 1957. The polling of votes took place on February 28, 1957, and the result of the election was declared on March 2, 1957. The appellant secured the highest number of votes and was declared duly elected. A voter named Lakshmi Narain—who will hereinafter be referred to as the first respondent—submitted an application to the Election Commission of India to declare the election of the appellant Balwan Singh void on the ground *inter alia* that the appellant

" and/or his election agent and/or other persons with his consent, had committed corrupt practices, and the result of the election was materially affected by such corrupt practices committed in his interest ".

In clause (*f*) of paragraph 9 of the petition, which is material for this appeal, it was averred by the first respondent, that in villages set out in Annexure D, the appellant, his agents and workers with the consent of the appellant, hired and procured bullock carts and tractors for conveying women electors to and from the polling station. In Schedule D, was set out a list of 30 villages. This election petition was referred for trial to the District Judge, Kanpur, who was constituted the Election Tribunal for trying the petition. The appellant by his written

statement contended that the averments made in clause (*f*) of paragraph 9 were untrue ; that neither he nor his agents or workers had ever hired or procured bullock carts or trucks to convey women voters from the villages set out in Annexure D or any other village to the polling station. He also submitted that the first respondent had not disclosed the names of the voters nor the particulars of the conveyances and that the latter could not in view of the defective pleading be permitted to challenge the election of the appellant on that charge. On July 15, 1957, the first respondent applied for leave to amplify the particulars set out in the various clauses of paragraph 9 including the particulars set out in clause (*f*) and prayed for leave to amplify the recitals in that clause by incorporating Annexure D-1 in the petition. In Annexure D-1, the first respondent set out the naure of the vehicles used, the names of the owners of the vehicles, the names of the villages from which women voters were conveyed at the expense of the appellant to the polling station and back, the hire paid, and the description of the families to which the women voters who were conveyed belonged. The appellant submitted in rejoinder that by his application, the first respondent in substance sought not to amplify the particulars given by him, but to make allegations about fresh corrupt practices, and prayed that several clauses including clause (*f*) of paragraph 9 be deleted. On July 29, 1957, the Election Tribunal rejected the application of the first respondent. He observed that :—

> "Merely saying that the corrupt practice was followed in the villages whose list was given in Annexure 'D' does not amount to giving particulars as were required to be furnished by the aforesaid section 83 (1) (*b*) of the Representation of the People Act"

and directed that certain paragraphs including clause (*f*) of paragraph 9 and Annexure be struck off.

Relying upon a judgment of the Allahabad High Court delivered on September 9, 1957, *Mubarak Mazdoor* v. *K. K. Banerji and another*[1], in which, the practice to be followed in dealing with allegations of corrupt practices, made in an election petition, on the ground of vagueness, was enunciated the first respondent applied for review of that order. The Election Tribunal, by its order, dated September 13, 1957, accepted the plea of the first respondent for review of the order, and directed that the order dated July 29, 1957, be set aside.

The appellant applied under Article 227 of the Constitution, to the High Court of Judicature at Allahabad, challenging the correctness and propriety of the order of the Election Tribunal reviewing its order, dated July 29, 1957. By its order, dated March 6, 1958, the High Court substantially confirmed the order passed by the Tribunal. The High Court observed that the Tribunal had jurisdiction to review its earlier order, and that in the circumstances of the case it was unnecessary to decide whether the order, dated September 13, 1957, was properly passed, because the order, dated July 29, 1957, was "unjust and improper", and the matter having been brought before it in a proceeding under Article 227 of the Constitution, the High Court could rectify the error by setting aside the earlier order. Pursuant to the order passed by the High Court, the averments made in clause (*f*) of paragraph 9 were restored, and Annexure D-1 was incorporated in the petition.

By its order, dated August 16, 1958, the Tribunal dismissed the petition holding thatt he first respondent failed to establish the corrupt practices on which the petition was founded. Dealing with the corrupt practice set out in clause (*f*) of paragraph 9, the Tribunal observed that the corrupt practice described in section 123 (5) of the Representation of the People Act, lies in the act of hiring or procuring vehicles by a candidate or his agent, and that this corrupt practice is not committed merely by conveying the voters, and as the particulars of hiring and procuring of the vehicles were not furnished in the petition, and the evidence adduced by the first respondent to support his case of hiring or procuring vehicles was unsatisfactory the case of the first respondent about the commission of a corrupt practice by the appellant stood unsubstantiated.

1. 13 E.L.R. 310.

In an appeal under section 116-A of the Representation of the People Act, against the order of the Election Tribunal the High Court of Judicature at Allahabad set aside the order and declared the election of the appellant void. The High Court held that the petition was defective in that it omitted to set out the date and place of the hiring of the tractor, which was proved to have been used for conveying voters to the polling station, but no prejudice was caused to the appellant as a result of that omission. In the view of the High Court the testimony of A.P. Malik, the Presiding Officer at Naholi polling station, corroborated by exhibit 22, a petition submitted on the date of the polling by one Raghuraj Singh, agent of Ram Dulari, a contesting candidate, and further supported by the evidence of witness Kalika Prasad and another witness Raghuraj Singh, established that voters were conveyed in a trailer attached to a tractor, at the instance of the appellant to the Naholi polling station and that the evidence of one Hanuman Singh established the contract of hiring the tractor used for conveying voters to the polling station. The High Court accordingly held that the appellant had committed the corrupt practice of hiring a vehicle for conveying voters to the polling station. Against the order passed by the High Court, declaring the election of the appellant void, this appeal has by Special Leave been filed.

Section 83 (1) (*b*) of the Representation of the People Act, as amended provides that an election petition shall set forth full particulars of any corrupt practice the petitioner alleges, including as full a statement as possible of the names of parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Section 123 sets out what shall be deemed to be corrupt practices for the purposes of the Act, and by clause (5) thereof, as it stood at the material date, it was in so far as it is relevant, provided :

> " The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person for the conveyance of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll."

Neither in the petition as originally filed nor as amended, the date and place of hiring the tractor which was alleged to have been used for conveying the voters, and the names of the persons between whom the contract of hiring was settled, were set out. The question which then falls to be determined is : Whether the election petition was liable to be rejected because it did not set forth particulars of the date and place of hiring the vehicle alleged to have been used in conveying voters ? In the opinion of the High Court the corrupt practice described in section 123 (5) being the hiring or procuring of a vehicle for conveying voters to the polling station, in the absence of a detailed statement as to the time and place of the hiring, the petition was defective. In so opining, the High Court relied upon an earlier decision of that Court, *Madan Lal* v. *Syed Zargham Haider and others*[1]. In that case, Bhargava, J., delivering the judgment of the Court, observed :

> " ....under section 123 (5) of the Representation of the People Act, a corrupt practice consists in the act of hiring or procuring certain types of vehicles by a candidate or his agent or by any other person for the conveyance of any elector to or from any polling station. A corrupt practice is, therefore, committed not by conveying the voter but by the act hiring or procuring the conveyance. In clause (*b*) of section 83 (1), an election petitioner is required to set forth full particulars of the corrupt practice including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The language used in this provision of law requires the setting forth of the full particulars of the corrupt practice and specially mentions at least three particulars which must be given. These are the names of the parties alleged to have committed the corrupt practice, the date when the corrupt practice was committed and the place of the commission of the corrupt practice."

Not the contract of hiring but the fact of hiring for conveying voters to and from the polling station is declared by section 123 (5) a corrupt practice. A petition which sets forth the particulars about the use of a vehicle for conveying voters to and from the polling station, with details as to the time and place coupled with as full a statement as possible in support of the plea that the vehicle was hired or procured by the

1. 13 E.L.R. 456.

candidate or his agent or another person substantially complies with the requirement of section 83 (1) (*b*). In considering whether a corrupt practice described in section 123 (5) is committed, conveying of electors cannot be dissociated from the hiring of a vehicle. The corrupt practice being the hiring or procuring of a vehicle for the conveyance of the electors, if full particulars of conveying by a vehicle of electors to or from an polling station are given, section 83 is duly complied with, even if they particulars of the contract of hiring, as distinguished from the fact of hiring are not given. Normally, the arrangement for hiring or procuring a vehicle, is within the special knowledge of the parties to that agreement and it is difficult to assume that it was intended to require the petitioner in an election dispute to set out the particulars of facts within the special knowledge of the other party, and expose the petition to a penalty of dismissal if those particulars could not be given. If particulars in support of the plea of the vehicle being hired or procured by the candidate or his agent or by another person was used for conveying voters to or from the polling station are set out, failure to set out particulars of the contract of hiring or arrangement of procuring will not render the petition defective.

By the Representation of the People Act, 1951, as amended by Act XXVII of 1956, a penalty of dismissal of a petition or the striking out of the plea of a corrupt practice merely because particulars in that behalf are not set out is not imposed. By section 90, clause (5) of the Act, the Tribunal is authorised to allow particulars of any corrupt practice alleged in the petition, to be amended or amplified in such manner as may, in its opinion, be necessary for ensuring a fair and effective trial of the petition. By section 90 (1) of the Act every election petition is, subject to the provisions of the Act and Rules made thereunder to be tried as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code to the trial of suits : and for failure to furnish particulars after being so ordered but not before the Tribunal may strike out a defective plea. The practice to be followed in cases where insufficient particulars of a corrupt practice are set forth in an election petition is this. An election petition is not liable to be dismissed *in limine* merely because full particulars of a corrupt practice alleged in the petition, are not set out. Where an objection is raised by the respondent that a petition is defective because full particulars of an alleged corrupt practice are not set out, the Tribunal is bound to decide whether the objection is well founded. If the Tribunal upholds the objection, it should give an opportunity to the petitioner to apply for leave to amend or amplify the particulars of the corrupt practice alleged; and in the event of non-compliance with that order the Tribunal may strike out the charges which remain vague. Insistence upon full particulars of corrupt practices is undoubtedly of paramount importance in the trial of an election petition, but if the parties go to trial despite the absence of full particulars of the corrupt practice alleged, and evidence of the contesting parties is led on the plea raised by the petition, the petition cannot thereafter be dismissed for want of particulars, because the defect is one of procedure and not one of jurisdiction of the Tribunal to adjudicate upon the plea in the absence of particulars. The appellate Court may be justified in setting aside the judgment of the Tribunal if it is satisfied that by reason of the absence of full particulars, material prejudice has resulted ; and in considering whether material prejudice has resulted failure to raise and press the objection about the absence of particulars before going to trial must be given due weight.

Assuming that in the case before us, the petition was defective because particulars as to the persons between whom the contract of hiring was entered into, and the date and place thereof have not been set out, the High Court was right in holding that no material prejudice was occasioned thereby. In the written statement to the petition as originally filed it was not expressly contended that because of the absence of particulars as to the names of the persons between whom the contract of hiring took place and the date and place of the contract, the appellant was unable to meet the charges made against him. Even after the petition was amended no such objection was raised by the appellant. Before the Tribunal at the hearing of the argument, a plea that the petition was defective because of lack of particulars relating to the

names of the persons who entered into the contract of hiring and the time and place thereof was apparently raised. But all the evidence relating to the hiring and the time and place thereof, was without objection admitted on the record. It is not even suggested that because of the absence of the particulars the appellant was embarrassed in making his defence or that he could not lead evidence relevant to the plea of corrupt practice set up by the first respondent. We are therefore unable to hold that any material prejudice was ocasioned because of the absence of those particulars in the petition.

The order of the Tribunal rejecting the application of the first respondent for amplification of the particulars of the corrupt practice alleged in the election petition was for reasons already set out erroneous; and in that view the question whether the High Court misdirected itself in holding itself bound, at the hearing of the appeal by its earlier judgment delivered on the writ petition, does not fall to be determined.

Counsel for the appellant urged that in any event the High Court was not justified in disagreeing with the considered judgment of the Tribunal on questions purely of appreciation of evidence. But this appeal has been filed with Special Leave granted under Article 136 of the Constitution. It is the settled practice of this Court to grant leave to appeal under Article 136 only if exceptional and special circumstances exist, or that substantial and grave injustice has been done and the case presents features of sufficient gravity to warrant a review of the decision appealed against. Merely because the appeal has been admitted by Special Leave the entire case is not at large and the appellant is not free to contest the findings of fact of the subordinate tribunals. Only those points on which Special Leave may initially be granted, can be urged at the final hearing; and normally Special Leave will not be granted by this Court under Article 136 (1) of the Constitution on a plea of error committed by the Courts below in the appreciation of evidence.

This would be sufficient to justify us in refusing to entertain the argument advanced by the counsel for the appellant. We may, however, observe that even on a review of the evidence we are satisfied that the High Court was right in its conclusion. There was before the Tribunal the evidence of Mr. A. P. Malik the Presiding Officer at the Naholi polling station who testified that he had seen on the day of polling a tractor at a distance of 100 to 150 yards from the polling booth. The witness stated that he did not remember having seen any flag or poster on the tractor. The witness, however, had made a note in his diary about an application tubmitted to him by Raghuraj Singh P.W. 30. A copy of that application has been produced and it is recited in that application that a tractor had come to the polling booth and was parked near "the line of voters"; that some persons a majority of whom were women were sitting on the tractor; that a red flag was hoisted and posters of the Socialist Party were pasted on the tractor; and that some men and women who came on the tractor were placed in the queue of voters. There was also the evidence of Raghuraj Singh, P.W. 38, a voter in the constituency. He stated that he had seen the tractor belonging to Chandra Bahadur Pandey of village Chaparagatha near the polling station; that a red flag was hoisted and posters were pasted over the tractor with the symbol of a *banyan* tree which was the emblem of the party of the appellant. He further stated that one Kalika Prasad and some female members of his family had come on the trailer and Radhey Shyam, an agent of the appellant, had taken all these voters and had given them slips of paper. Kalika Prasad was also examined and he stated that he and his wife and several other villagers had gone to the Naholi polling station to exercise their franchise on the trailer attached to the tractor; that a red flag was hoisted and posters were pasted on the trailer; and that there was on the posters the legend that votes be cast in favour of the appellant, It is established by unimpeachable evidence that a tractor was brought to Nahole Polling Station on the date of the polling. The Tribunl accepted the evidence of Mr. Malik but rejected the testimony of other witnesses on somewhat fanciful theories. The Tribunal observed that at the material time no tractor was brought near the polling booth and if one was brought the owner of the tractor may possibly have given a free lift to the voters to the polling station and back. The Tribunal

also suggested that the tractor may have been brought without the consent of the appellant or his agents. But the fact that a tractor was brought to the polling station, is clearly established by the evidence of Mr. Malik. That on the tractor was carried a red flag of the party of the appellant is established by the evidence of the two witnesses Raghuraj Singh, P.W. 30 and Raghuraj Singh P.W. 38 and also by the evidence of Kalika Prasad. It is also established on the evidence that on the tractor were displayed posters bearing the symbol of a *banyan* tree which was the election emblem of the party of the appellant at the election. There was no sufficient reason for discarding this testimony. Witness Hanuman Singh P.W. 56 deposed that he was present at the time of the settlement of the bargain of hiring the tractor belonging to Chandra Bahadur for conveying voters. The High Court accepted that evidence and we do not think judged in the context of the other evidence that the High Court was in error in so doing.

The appeal therefore fails and is dismissed with costs.

Sarkar, J.—I agree that this appeal fails.

The appellant had been declared elected at an election. The first respondent filed an election petition under the Representation of the People Act, 1951, to have the appellant's election declared void. Among other things it was said that the appellant had committed a corrupt practice which was described in the petition substantially in these words : In villages mentioned in Annexure D the appellant hired a tractor for conveying women electors from their houses to places of the polling and back.

The appellant applied to have this allegation struck out as it did not contain sufficient particulars of the corrupt practice alleged. The respondent in his turn sought permission to give particulars of this corrupt practice by amending his petition by the substitution of a new Annexure to this petition marked D-1 in the place of the existing Annexure D. The Election Tribunal first made an order refusing the amendment and striking out the allegation as desired by the appellant. Later it made another order reviewing its earlier order and thereby cancelled that order. By this order it directed the restoration of the allegation struck out and the substitution of Annexure D by Annexure D-1.

The appellant moved the High Court at Allahabad under Articles 226 and 227 of the Constitution against the latter order of the Tribunal. The High Court held that the Tribunal had the power to review any order made by it and that the order made on review allowing the amendment was correct. It also held that if the Tribunal had no power of review, the High Court being itself seized of the matter would be deemed to have set aside the first order of the Tribunal and made an order allowing the amendment. The appellant did not appeal from this order of the High Court.

The parties then went to trial before the Tribunal. The appellant led his evidence without any objection as to the petition being defective for want of any particulars. The Tribunal took the view that the corrupt practice alleged had not been proved and dismissed the petition. On appeal the High Court held that the corrupt practice had been proved and set aside the election of the appellant. Hence this appeal.

It is said that the election petition should have been dismissed because sufficient particulars of the corrupt practice alleged had not been given in the petition. The corrupt practice alleged is of the kind mentioned in section 123 (5) of the Act which is in these words :

> "The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate........................for the conveyance of any elector................to or from any polling station."

It is contended that the hiring of the vehicle is an essential element of the corrupt practice mentioned in this section. I am leaving out of consideration the

procuring of a vehicle because that is not the case here. It is said that the petition must, therefore, state the particulars of the date and place of the contract of hiring and the parties to it. Reference is made to section 83 of the Act where it is provided that :

"An election petition............shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such corrupt practice."

The question thus arises whether the particulars of the parties to the contract of hiring and the date when and the place where it had been made should have been given.

The respondent does not deny that the particulars of the contract of hiring had not been stated in the petition. According to him the corrupt practice mentioned in section 123 (5) is not committed by the contract of hiring but by the conveyance of the electors in a hired vehicle Hence, he says that no question as to these particulars arises.

In my view the appellant's contention is well-founded. Under the section the hiring of the vehicle for the conveyance of electors is the corrupt practice. It is of the essence of this corrupt practice that the vehicle must have been hired, that is to say, a contract for the hiring of the vehicle must have been made. I am unable to imagine how a vehicle can be hired without a contract. Therefore it seems to me that particulars of that contract should be given.

I am also unable to appreciate the respondent's contention. It seems to me that to say that the corrupt practice is committed by the conveyance of electors in a hired vehicle is the same thing as saying that electors had been conveyed by a vehicle which had been hired, that is, a vehicle in respect of which a contract of hiring had been made. Simple conveyance of electors in a vehicle is not enough. The vehicle must be a hired vehicle. Hence there is no corrupt practice unless the hiring of the vehicle, that is, the contract of hire in respect of it is established.

Whether a simple contract of the hiring of a vehicle for the conveyance of electors without actual conveyance of them would amount to a corrupt practice or not, is a question that does not arise in this case. But it seems to me that whatever view is taken of that question, that would not make the contract of hiring any the less an essential element of the corrupt practice described in section 123 (5).

In my view therefore the appellant was entitled to the particulars the want of which he now complains. The question then is what is the effect of the failure to supply these particulars? I am unable to agree that the petition was thereupon liable to be dismissed. It has not been shown to us that the Act provides for such dismissal. Section 83 does not say that on failure to furnish the prescribed particulars the petition shall be dismissed. On the other hand, section 90 (3) of the Act provides that,

"The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117."

This section does not include section 83. It therefore seems to me that the appellant was not entitled to a dismissal of the petition for want of the particulars.

The appellant was certainly entitled to apply for the particulars. I conceive he would have such a right under section 83 and also section 90 (1) of the Act which made the provisions of the Code of Civil Procedure applicable to a trial before an Election Tribunal, in the view that I have taken, that the contract of hiring is an essential element of the corrupt practice mentioned in section 123 (5) of the Act. The appellant however made no such application. Instead he went to trial and led evidence without making any grievance that he was hampered in his defence for want of the particulars. He cannot at a later stage complain about the absence of the particulars. It is unnecessary to consider what would have happened if

upon the appellant's application the respondent had been directed to furnish the particulars and had failed to do so, for no such order had been made.

It only remains for me to say that it is not open for the appellant to contend now that the Tribunal was wrong in reviewing its order. The High Court rejected that contention in the order made on the application under Articles 226 and 227 of the Constitution. For greater safety it also made an order allowing the amendment sought by the respondent. The High Court's decision not having been questioned by the appellant by an appeal, is binding on him. He must therefore accept the position that the amendment of the petition was proper. I may also state that if the amendment had not been properly allowed that would not have made any difference. The only result would have been that some more particulars of the corrupt practice alleged would have been wanting. For the reasons earlier stated this would not have entailed a dismissal of the election petition.

The only other point that was argued at the Bar was a question of fact, namely, whether the corrupt practice alleged had been proved. On that point I am in perfect agreement with the view expressed by my learned brothers and have nothing to add.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM AND J. C. SHAH, JJ.

Rabari Ghela Jadav .. *Appellant**

v.

The State of Bombay .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 421 and 422—Scope—High Court if can admit appeal on question of sentence only and dismiss the appeal on merits summarily.

While an Appellate Court has power to dismiss an appeal summarily, if it considers that there is no sufficient ground for interfering, it has no power to direct, as in the instant case, that the appeal shall be heard only on the point of sentence. Such an order is not an order of summary dismissal under section 421 of the Criminal Procedure Code and neither is it an order under section 422 of the Code. When an appeal is filed it is an appeal against conviction and sentence and it is not permissible for an Appellate Court to direct that it shall be heard only on the question of sentence. The power under section 423 to reduce sentence can be exercised only after the requirements of section 423 have been complied with. The Appellate Court, after hearing the appeal, certainly has the power in finally disposing of the appeal to reduce the sentence but that does not entitle it to direct that an appeal is admitted only on the question of sentence.

Appeal by Special Leave from the Judgment and Order, dated the 19th November, 1957, of the Bombay High Court at Rajkot in Criminal Appeal No. 137 of 1957 arising out of the Judgment and Order, dated the 31st August, 1957, of the Sessions Judge, Sorath Division, Junagadh, in Sessions Case No. 26 of 1957.

P. K. Chattejee, Advocate (At State expense), for Appellant.

H. J. Umrigar and *R. H. Dhebar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Imam, J.—This appeal is by Special Leave. The appellant was convicted under section 304, Part I of the Indian Penal Code and sentenced to imprisonment for life. He appealed to the Bombay High Court. According to the judgment of the High Court the appeal was admitted only on the point of sentence. The High Court reduced the sentence from imprisonment for life to 10 years' rigorous imprisonment.

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* Criminal Appeal No. 14 of 1959. 26th February, 1960.

It was submitted on behalf of the appellant that the High Court could not, in law, admit an appeal only on the point of sentence and the appellant was entitled to have his appeal heard on the merits of his conviction as well. The evidence upon which the appellant was convicted was unsatisfactory and he was entitled to be acquitted.

Shortly stated, the case of the prosecution was that the appellant had caused the death of Zina Hira on 6th April, 1957, when the deceased was returning from an adjoining village to the village of his residence. The appellant met him on the way and accused him of having committed theft in the appellant's house which the deceased denied. Upon this the appellant attacked him with a stick which had iron rings round it. A number of blows were given by the appellant with this stick in consequence of which Zina Hira fell down. Although a doctor was called for from Keshod, 8 miles away, ultimately the deceased was taken to Junagadh for better medical treatment but died on the way in the early hours of the morning of 7th April.

According to the case of the appellant he was not present at the scene of the crime and pleaded not guilty to the charge.

According to the judgment of the High Court the appeal of the appellant before it was admitted only on the point of sentence. It was urged that this procedure adopted by the High Court was not in conformity with the provisions of sections 421 and 422 of the Code of Criminal Procedure. Reliance was placed upon the decisions of the Calcutta High Court and Patna High Court in the cases of *Nafar Sheikh* v. *Emperor*[1], *Gaya Singh* v. *King Emperor*[2], *Sudhir Kumar Neogi and another* v. *Emperor*[3] and *Shiekh Rijhu and others* v. *Emperor*[4] and of the Privy Council in the case of *The King Emperor* v. *Dahu Raut*[5]. Reference was also made to the decision of the Patna High Court in the case of *Kuldip Das* v. *King Emperor*[6] and the decision of the Bombay High Court in the case of *Bai Dhankor* v. *Emperor*[7].

In order to appreciate the submission made on behalf of the appellant reference to certain provisions of the Code of Criminal Procedure in Chapter XXXI concerning Appeals will be necessary. Under section 418 (1) an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only. It is unnecessary to refer to sub-section (2) of this section for the purposes of this appeal. Under section 419 every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367. As to what should follow on the presentation of such a petition it will be necessary to quote the provisions of sections 421 and 422 of the Code. Section 421 reads :

"421 (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

Section 422 reads :

"422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal ;

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1. (1914) I.L.R. 41 Cal. 606.
2. (1925) I.L.R. 4 Pat. 254.
3. A.I.R. 1942 Pat. 46.
4. A.I.R. 1931 Pat. 351.
5. (1935) L.R. 62 I.A. 129 : 68 M.L.J. 653 (P.C.).
6. (1932) I.L.R. 11 Pat. 697.
7. I.L.R. (1937) Bom. 365.

and, in cases of appeal under section 411-A, sub-section (2), or section 417, the Appellate Court shall cause a like notice to be given to the accused."

It is clear from these provisions that on receiving the petition and a copy under section 419, the Appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering it will dismiss the appeal summarily, and that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard. The recording of an order that the appeal is admitted, when it is not summarily dismissed, is not a happily chosen expression as was pointed out by the Privy Council in the case of *The King Emperor* v. *Dahu Raut*[1]. Section 421 gives ample power to the Appellate Court to dismiss an appeal summarily if it considers that there is no sufficient ground for interfering. On the other hand, if it does not dismiss the appeal summarily then it is obligatory upon it to cause notice of the appeal to be given to the appellant and to such officer as the State Government may appoint in this behalf of the time and place at which such appeal will be heard. These provisions do not contemplate a partial summary dismissal of an appeal as was pointed out by the Privy Council in the above-mentioned case where it was stated by Lord Thankerton :

"The terms of the section equally exclude the possibility of partial summary dismissal, *e.g.*, in so far as the conviction is appealed against. Failing summary dismissal, the provisions of sections 422 and 423 apply and, in their Lordships' opinion, the provisions as to notices in section 422 and the provisions as to sending for the record in section 423 are clearly peremptory and there can be no room for revision at that stage."

It was, however, submitted on behalf of the State of Bombay that the facts in the case before the Privy Council can be distinguished from the facts of the present case because in the case before the Privy Council no notices were issued under section 422 and the record was not sent for in accordance with section 423. In the present case notices were issued under section 422 and the record was sent for in accordance with section 423 of the Code. Particular reliance was placed upon the concluding portion of the Privy Council judgment to the following effect :—

"Accordingly, their Lordships will humbly advise His Majesty that the appeals should be allowed, and that it should be declared that, upon the true construction of the Criminal Procedure Code, the Appellate Court is entitled to dismiss an appeal summarily in terms of section 421 unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, and that where the appeal is not dismissed summarily, the Court is bound, in order to the disposal of the appeal, to comply with the provisions of section 422 as to notice, and with the provisions of section 423 as to the sending of the record, if such record is not already in Court . . . . .".

It seems to us, however, having regard to the provisions of the Code, that while an Appellate Court has power to dismiss an appeal summarily, if it considers that there is no sufficient ground for interfering, it has no power to direct, as in the case before us, that the appeal shall be heard only on the point of sentence. Such an order is not an order of summary dismissal under section 421 and neither is it an order in terms of section 422 of the Code. When an appeal is filed it is an appeal against conviction and sentence and it is not permissible for an Appellate Court to direct that it shall be heard only on the question of sentence. Our interpretation of sections 421 and 422 is in keeping with the interpretation of these sections by the Privy Council in *Dahu Raut's case*[1]. The decisions of the Calcutta High Court and the Patna High Court in *Nafar Sheikh* v. *Emperor*[2], *Sudhir Kumar Neogi and another* v. *Emperor*[3] and *Gaya Singh* v. *King Emperor*[4], referred to above appear to us to be correct. In these circumstances reference need not be made to the view expressed by the Patna High Court in *Kuldip Das* v. *King Emperor*[5], which was a judgment before the decision of the Privy Council in *Dahu Raut's case.*[1] The decision of the Bombay High Court in *Bai Dhankor* v. *Emperor*[6], endeavoured to find a way in which the

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1. (1935) L.R. 62 I.A. 129 : 68 M.L.J. 653 (P.C.).
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2. (1914) I.L.R. 41 Cal. 606.
3. A.I.R. 1942 Pat. 46.
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5. (1932) I.L.R. 11 Pat. 697.
6. I.L.R. (1937) Bom. 365.

difficulty could be resolved where the Appellate Court was of the opinion that only the question of sentence was involved. For the purposes of this appeal it is unnecessary for us to say anything about this decision because what was stated there does not arise for consideration, as, in the present case, according to the judgment of the High Court, the appeal was admitted only on the point of sentence. It was also urged by Mr. Umrigar that under section 423 an Appellate Court had the power to reduce the sentence. That is so, but that power can only be exercised after the requirements of section 422 have been complied with. The Appellate Court, after hearing the appeal, certainly has the power in finally disposing of the appeal to reduce the sentence but that does not entitle it to direct that an appeal is admitted only on the question of sentence. We make it clear, however, that in dealing with Mr. Umrigar's submission on this point we are concerned with the powers of an Appellate Court and not with the power of a High Court in the exercise of its revisional jurisdiction which does not arise for consideration in this appeal. In our opinion, the form of the order admitting the appeal in the present case was invalid and the appellant could have insisted that since the appeal had not been summarily dismissed, the High Court should have heard his appeal on the merits as well.

As the appeal was not heard on the merits, we considered whether the appeal should be sent back to the High Court for rehearing on the merits. We have, however, thought it fit to hear the appeal on the merits for ourselves.

We, accordingly, heard the learned advocate for the appellant on the evidence. It is clear to us from a perusal of the evidence that the case has been amply proved against the appellant. There was an eye-witness who saw the appellant assaulting the deceased with a stick. He was in some way related to the deceased, which he attempted to deny, otherwise there is nothing in his evidence to induce a Court to distrust his testimony. This eye-witness, Bava Tapu, immediately after the assault, went to the Police Patel of Simroli, one Keshav, and told him that the deceased had been assaulted by the appellant. Keshav corroborated Bava Tapu in this respect. Keshav's evidence in this respect is also corroborated by Natha Jiwa who stated that Bava Tapu came and informed Keshav that Zina Hira had been severely assaulted and injured by the appellant. Bogha Jiwa also corroborated Keshav in this respect. None of these witnesses have any real motive to depose against the appellant. In addition to this evidence there was the dying declaration of the deceased as to who his assailant was. Furthermore, there was the recovery of a stick buried underground at the instance of the appellant which was found to be stained with human blood according to the report of the Serologist. The other circumstantial evidence need not be referred to.

It was urged on behalf of the appellant that the reason for the appellant assaulting the deceased could not be true as no reference was made to it in the First Information lodged by Keshav. Reference also was made to the evidence of the Police Officer Priyakant that no information of the theft had been lodged by the appellant at the thana. The appellant in his statement denied that the deceased had committed any theft in his house and the witness Karsan, brother of the appellant, had stated in cross-examination that there had been no theft in their house. This witness was examined by the prosecution but was declared hostile and permission was granted by the Court to cross-examine him. It seems to us, however, that even if the story about the accusation of theft against the deceased made by the appellant was not stated in the First Information the omission is of little consequence because even Keshav stated in the First Information that he had enquired from Bava Tapu as to how the quarrel had started. Merely because there was no information lodged about the theft at the Police Station, it does not necessarily follow that the appellant could not have been suspecting the deceased. The denial of the appellant and of his brother cannot assume much importance as it would be natural for them to deny any such thing. Apart from this even if the real cause for the assault may be obscure, if the evidence is clear that the appellant assaulted the deceased, it matters very little if the Court has not before it a very ear motive for

the assault. As we have already said, apart from Bava Tapu hesitating to admit that he was somewhat related to the deceased, there was no apparent motive for him to depose against the appellant in such a serious case as this. His conduct would show that he had, in fact, witnessed the assault because immediately after the assault he went to the Police Patel Keshav and informed him that the appellant had assaulted the deceased with a stick. There is no reason to doubt the genuineness of the dying declaration. There is no good reason for supposing that the deceased would have accused the appellant falsely as there was no previous enmity established. It is also unlikely that he would let go his real assailant and accuse the appellant falsely. The dying declaration is corroborated by the evidence of the eye-witness Bava Tapu. It further receives corroboration from the recovery of the stick stained with human blood at the instance of the appellant which had been identified by Bava Tapu as belonging to the appellant.

It is clear, therefore, that the evidence in the case, which we have carefully examined and see no good reason to distrust, established beyond doubt that the appellant had struck the deceased several blows with a stick and thus caused his death. He was, therefore, guilty at least under section 304 of the Indian Penal Code as found by the trial Court. The reduced sentence imposed by the High Court does not appear to be unduly severe.

The appeal is, accordingly, dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM, A. K. SARKAR, K. N. WANCHOO AND J. C. SHAH, JJ.

Mohamed Dastagir .. *Appellant**

v.

The State of Madras .. *Respondent.*

The Union of India .. *Intervener.*

Criminal Procedure Code (V of 1898), *section* 422—*Requirements—Appeal against acquittal—Advocates entering appearance for the accused respondent and requesting not to issue summons to him—Notice of appeal given to Advocates—Sufficiency.*

Constitution of India (1950), *Article* 20 (3)—*Applicability—Essentials.*

Penal Code (XLV of 1860), *section* 165-A—*Attempt to corrupt public servant—Six months' rigorous imprisonment and fine of Rs.* 1,000—*If severe.*

Section 422 of the Criminal Procedure Code does not speak of notice of the appeal being served on the accused. It states that notice is to be given to the accused. If, as in the circumstances of the present case, the High Court is intimated that the accused has entered appearance and has notice of the appeal filed against him and the Court is requested not to issue any summons to him, it can hardly be said that notice of the appeal had not been given to the accused. In any event notice issued under section 422 to the Advocate who had entered appearance for the accused is sufficient.

Where the person accused was asked to produce the money in his pocket (which he was alleged to have attempted to offer to the Police Officer who asked him to produce the same for marking for identification) it was within the power of the accused to refuse to comply with the Police Officer's request. If he produced that money when asked to do so, it cannot be said that he was compelled to produce the currency notes. In the instant case, the Police Officer concerned was not investigating the case and had not even accused the person of having committed any offence. The facts established do not attract the provisons of Article 20 (3) of the Constitution of India.

In an appeal against acquittal where the grounds given by the trial Court for distributing the evidence of the prosecution witness were perverse, the appellate Court is justified in acting upon such evidence and setting aside the order of acquittal made by the trial Court.

A sentence of six months' rigorous imprisonment and a fine of Rs. 1,000 could not be said to be severe in a case where there had been an attempt to corrupt a responsible public servant.

Appeal from the Judgment and Order dated the 31st October, 1956, of the Madras High Court in Criminal Appeal No. 20 of 1956.

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* Crl. A. No. 137 of 1957. 26th February, 1960.

G. B. Aggarwala, Senior Acvocate (*S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P.L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him) for Appellant.

R. Ganapathy Iyer and *T. M. Sen*, Advocates, for Respondent.

C. K. Daphtary, Solicitor-General of India (*H. J. Umrigar* and *T. M. Sen*, Advocates within him), for Intervener.

The Judgment of the Court was delivered by

Imam, J.—This is an appeal on a certificate granted by the High Court of Madras.

The appellant was tried by the Special Judge of Tiruchirappalli under section 165-A of the Indian Penal Code for attempting to bribe Mr. Kaliyappan, Deputy Superintendent of Police of Ramanathapuram. The Special Judge came to the conclusion that the charge framed against the accused had not been established. He, accordingly, acquitted the appellant. Against the order of acquittal the State of Madras appealed to the High Court of Madras under section 417 of the Code of Criminal Procedure. The High Court came to the conclusion that the evidence established that the appellant had attempted to bribe the aforesaid Deputy Superintendent of Police. It accordingly convicted the appellant under section 165-A, Indian Penal Code and sentenced him to 6 months' rigorous imprisonment and a fine of Rs. 1,000 in default, to undergo further rigorous imprisonment for 6 months.

According to the prosecution case, the appellant attempted to bribe Mr. Kaliyappan, the Deputy Superintendent of Police, by offering him a sum of money contained in an envelope at his bungalow in the morning of June 14, 1954. In order to appreciate the circumstances in which the bribe was offered, reference to certain events which led to the incident on June 14 at the bungalow of the Deputy Superintendent of Police becomes necessary. In village Irwadi there are two factions one headed by the appellant and his brother and the other headed by the village munsif. On June 3, 1954, two complaints reached the Keelakarai Police Station, one by the appellant against the village munsif and the other by the village munsif against the appellant. According to the appellant on June 3, 1954, after prayers in the mosque the village munsif had abused him and had attempted to murder him with a knife. Some persons intervened but he managed to escape but was chased by the village munsif to his house. The version of the village munsif was that he was busy that day preparing the receipt for the release of the appellant's impounded cattle when the latter abused him, beat him with his shoe and kicked him in the stomach causing minor injuries. On June 5, 1954, the appellant met Mr. Kaliyappan at the Central Bus stand at Madurai and handed over to him a petition, Exhibit P-1 in which he complained against the village munsif. Mr. Kaliyappan made an endorsement on this petition directing the Inspector of Ramanathapuram Circle to send for both the parties and warn them against doing acts which would create a breach of the peace in the village and that this petition was not to be sent to the Sub-Inspector (P.W. 8) as it was alleged that he was siding against the appellant. On June 12, 1954, Mr. Kaliyappan sent a memo. (Exhibit P.-2) to the Inspector of Ramanathapuram Circle directing him to take steps to see that peace was preserved in the village. This Police Officer was also asked to take action against the offenders with respect to whom there was evidence in connection with the occurrence of June 3, 1954. Mr. Kaliyappan also, in view of the situation, had directed this Police Officer to see whether steps should not be taken to seize the revolver of the appellant's brother Rashid for which he had a licence. The Inspector of Ramanathapuram Circle thereafter prepared a detailed report (Exhibit P-7) of the result of his enquiry and handed it over to Mr. Kaliyappan on June 13, 1954. On the night of June 13, 1954, at about 10 P.M. the appellant went to the bungalow of Mr. Kaliyappan, the Deputy Superintendent of Police, at Ramanathapuram and complained against the Inspector of Police of Ramanathapuram Circle and the Sub-Inspector requesting the Deputy Superintendent of Police to look into the matter personally and not to leave the investigation exclusively in the hands of the Inspector. Mr. Kaliyappan told the appellant that he knew nothing

about the case and could not say or do anything off-hand and that the appellant should see him about a week later by which time he would have perused the record and would be in a position to look ino his grievances. According to the appellant, however, the Deputy Superintendent of Police had asked him to come to him next morning.

On June 14, 1954, according to the prosecution, the appellant went to Mr. Kaliyappan's bungalow at about 7-15 A.M. who was at that time looking into certain papers. He was informed that a visitor had come to see him. The appellant accordingly entered his office room when he again complained to the Deputy Superintendent of Police against the village munsif. At the same time he presented to this Police Officer a closed envelope. Mr. Kaliyappan thought that the envelope contained a petition but on opening it he found that it contained currency notes. He was annoyed at the conduct of the appellant. He threw the envelope at the appellant's face, but the envelope fell down on the floor and the appellant picked it up. The Deputy Superintendent of Police called his office orderly but as there was no response he went out of the office room and told his milk-maid to get the camp clerk. By that time the orderly turned up. The appellant had in the meantime remained in the office room and on the appearance of the orderly Mr. Kaliyappan asked the appellant to produce the envelope which he had thrown down and which the appellant had picked up. The appellant after taking out of his pocket some currency notes placed them on the table without the envelope. Subsequently, during the police investigation, torn bits of paper were collected from near the office window and it is alleged that those torn bits of paper were the pieces of the envelope in which the currency notes were presented to Mr. Kaliyappan. Thereafter, Mr. Kaliyappan asked his orderly to put office rubber stamp date seal on the notes and the same was done. By that time the camp clerk P.W. 2 had arrived Mr. Kaliyappan asked the camp clerk to note down the number of the currency notes which he did. The list so prepared is Exhibit P-4. Mr. Kaliyappan then dictated the memo. Exhibit P-5 to the local Sub-Magistrate informing the latter that the appellant had offered him Rs. 500 in currency notes requesting him to "drop action" registered against the appellant at Keelakari Police Station. Mr. Kaliyappan informed the Magistrate in this connection that he had seized the currency notes and his office rubber stamp seal had been placed on them and that he would be grateful to the Magistrate if he would come to his office and record the statement of the appellant whom he had detained in his office.

The case of the appellant, as would appear from his statement to the Special Judge, was that he had been to Mr. Kaliyappan, the Deputy Supeintendent of Police in the night of June 13, 1954, and in the morning at 7-15 A.M. on June 14, 1954. He had gone to Mr. Kaliyappan's bungalow in the morning of June 14 as he had been requested to do so. He had told the Deputy Superintendent of Police that he had been humiliated by his Police Officers who had arrested him and had searched his house and that Mr. Kaliyappan should redress his grievances. Mr. Kaliyappan showed him scant courtesy and insulted him upon which the appellant told Mr. Kaliyappan not to insult him and that he should tell the appellant whether he would redress the grievances of the appellant or not and that if he was not prepared to redress the grievances, the appellant would take the matter to the higher authorities. On this, Mr. Kaliyappan got up from his chair and enquired of the appellant what could he do by going to the higher authorities and threatened to beat the appellant. The appellant also got up and said something to him upon which Mr. Kaliyappan called out for his orderly. The orderly came and was told by Mr. Kaliyappan that he was going to be beaten by the appellant and therefore he should catch hold of the appellant which the orderly did. Then Mr. Kaliyappan told the orderly that there was money in the appellant's pocket and that he should remove it. The orderly accordingly removed the money from the appellant's pocket and gave it to Mr. Kaliyappan. The money in his pocket was Rs. 500. Mr. Kaliyappan then directed his orderly to put his seal on the notes.

The Special Judge gave various reasons for not accepting the uncorroborated testimony of Mr. Kaliyappan and held that the presumption of the innocence of

the accused had not been displaced by his solitary testimony. The High Court did not consider the grounds given by the Special Judge for discarding the testimony of Mr. Kaliyappan as at all justified and was of the opinion that the Special Judge had taken a perverse view of his evidence and of the other evidence in the case.

In the main three points were urged in support of the plea that the conviction of the appellant should be set aside. The first point urged was that the provisions of section 422 of the Code of Criminal Procedure had not been complied with. Accordingly the High Court judgment setting aside the acquittal of the appellant was vitiated. The second point urged was that there had been violation of the provisions of Article 20(3) of the Constitution which vitiated the conviction. The third point urged was that the appellant having been acquitted by the Special Judge the High Court should not have set aside the acquittal unless there were compelling reasons. The several grounds stated by the Special Judge in distrusting the evidence of Mr. Kaliyappan had not been specifically considered by the High Court and without those grounds being displaced the High Court erred in setting aside the order of acquittal passed by the Special Judge. Lastly, it was urged that in the circumstances of the present case the sentence passed by the High Court was severe. The circumstances relied upon in this connection will be stated in due course.

Regarding the first point a few facts have to be stated. The State's appeal against the acquittal of the appellant was admitted by the High Court on February 22, 1956. Appearance on behalf of the appellant was filed on February 24, 1956. The Advocates for the appellant were M/s. V. L. Ethiraj and S. M. Cassim. One Mr. R. Santanam, an Advocate who worked in the office of the partnership of M/s. V. L. Ethiraj and V. T. Rangaswami Ayyangar, wrote to the High Court Office on February 27, 1956, requesting that summons need not be issued and compliance with rule 240-A, Criminal Rules of Practice, might be dispensed with, in view of the appearance for the appellant having been filed on February 24, 1956. As appearance had been entered on behalf of he appellant even before the issue of notice to him, notice under section 422 of the Code of Criminal Procedure was issued by the Court on March 5, 1956, to M/s. Ethiraj and Cassim, Advocates for the appellant on the records of the High Court. After the appeal was ready for hearing the usual intimation under rule 240-A was also sent on September 4, 1956, to the Special Judge, Tiruchirappalli, for being communicated to the appellant as it was the practice of the High Court not to dispense with altogether the issue of such intimation under any circumstance. Mr. Ethiraj appeared for the appellant at the hearing of the appeal and made submissions on questions of fact as well as on questions of law before the learned Judge of the High Court who heard the appeal. It was contended for the appellant that the latter part of section 422 of the Code had not been complied with inasmuch as the High Court did not cause a notice of the appeal to be given to the appellant. Reliance was placed on certain decisions of this Court and some of the High Courts in support of the argument that the provisions of section 422 of the Code were mandatory and non-compliance thereof vitiated the judgment of the High Court. In *Nanumal* v. *The State of Madhya Pradesh*[1] decided on the 13th of November, 1952, this Court set aside the order of the High Court converting the acquittal of the accused into one of conviction without serving a notice on him as provided by section 422 of the Code of Criminal Procedure. This Court held that although a notice had been issued it was not served on the accused. The accused must be accorded an opportunity to contest an appeal preferred by the State Government in the High Court. The procedure adopted in the High Court was bad. The case was accordingly remanded to the High Court for rehearing of the appeal in accordance with law. This decision is of little assistance because the accused had not been given in that case any opportunity to contest the appeal filed by the State Government in the High Court. Reliance was also placed on the decision of this Court in *Dwaraka Prasad* v. *The*

1. Crl. Appeal No. 86 of 1952 (unreported.).

State[1] decided on the 6th of October, 1950. In that case with reference to section 422 of the Code of Criminal Procedure this Court observed that:

> "The provision of the section, as its language shows, is mandatory and a compliance with it an essential preliminary to the hearing of the appeal. The arrest of the accused under a non-bailable warrant cannot be the substitute of a notice of appeal as is required under law."

In that case, however, the lawyer who appeared before the High Court had made it clear that his appearance was on the instruction of the father of the accused and not on the instruction of the accused himself. There are certain observations in the judgment of this Court which indicate that if the lawyer concerned had told the High Court that he was appearing on the instruction of the accused perhaps this Court would not have interfered with the judgment of the High on this ground alone. It would be useful to quote what this Court had said in that case. It said:

> "There is, however, no power or authority given by the accused Dwarkaprasad to the learned Advocate and the Advocate himself does not say in his affidavit that he received any instructions from the accused. He was instructed, he says, to appear in the case by Ram Lal, the father of the accused, and on the materials before us we are not in a position to say that it was the accused who really instructed the Advocate through his father; it may be that the father having got information of the appeal from some other source thought it proper to engage an Advocate for the defence of his son. As the position is extremely obscure, we cannot but feel that there has been a material defect in the procedure relating to the hearing of the appeal by reason of non-compliance with a mandatory provision of the Code and this has led to a miscarriage of justice. It is a case where the appeal was against an order of acquittal and the appellate Court having set aside the judgment of acquittal has convicted the appellant of murder and sentenced him to death. In such circumstances we must be satisfied that there was not even the possibility of the accused being deprived of his legal right of presenting his case properly before the Appellate Tribunal."

In the case before us it is perfectly clear that the High Court was intimated in the clearest terms that appearance had been entered on behalf of the appellant and two Advocates of the High Court were representing him, one of them an eminent Advocate of the Court. Indeed, the High Court was requested not to issue any summons to the appellant because appearance had already been entered on his behalf. In spite of that the High Court issued notice under section 422 to Mr. Ethiraj and Mr. Cassim. Even thereafter, the High Court took the precaution to intimate the Special Judge of Tiruchirappalli to inform the accused about the appeal filed against him. In these circumstances it can hardly be said that notice of the appeal had not been given to the appellant. Section 422 does not speak of the notice being served on the appellant. It states that notice is to be given to the accused. If, as in the circumstances of the present case, the High Court is intimated that the accused has entered appearance and has notice of the appeal filed against him and the Court is requested not to issue any summons to him, it can hardly he said that notice of the appeal had not been given to the accused. The High Court found on the facts that the appellant was fully apprised of the time and place at which the appeal would be heard. It was, however, urged that Mr. Ethiraj and Mr. Cassim had been engaged by the brother-in-law of the appellant and not on his instructions and that that brother-in-law had kept the appellant in the dark. It is impossible to believe this. The appellant had been acquitted and an appeal had been filed against his acquittal. It is impossible to accept the suggestion that the brother-in-law of the appellant kept the appellant in the dark. However much the appellant's brother-in-law may have been looking after the affairs of the appellant in India, he could not have failed to inform the appellant of the appeal filed by the State against his acquittal because if the acquittal was set aside and the appellant was sentenced serious consequences would arise.

As to the second submission, Article 20 (3) of the Constitution states:

> "No person accused of any offence shall be compelled to be a witness against himself".

Before this provision of the Constitution comes into play two facts have to be established: (1) that the individual concerned was a person accused of an offence and (2) that he was compelled to be a witness against himself. If only one of these

1. Crl. Appeal No. 1 of 1950 (unreported.).

facts and not the other is established, the requirements of Article 20 (3) will not be fulfilled. It was, however, urged that on the facts the appellant must be regarded as a person who was accused of an offence at the time that Mr. Kaliyappan asked him to produce the money. The circumstances also showed that the appellant did so on compulsion. He was at the time within the power of the Deputy Superintendent of Police and was compelled to comply with his direction. Mr. Kaliyappan being of the rank of a Deputy Superintendent of Police could himself make the investigation. The offence had been committed in his presence and the appellant was in the situation of an arrested person. Reliance was placed upon the decision of this Court in *M. P. Sharma* v. *Satish Chandra and others*[1], in support of the proposition that a compelled production of incriminating document by a person during police investigation is testimonial compulsion within the meaning of Article 20 (3) of the Constitution. In that case, this Court had observed at page 1088 :

> " Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court-room. The phrase used in Article 20 (3) is " to be a witness " and not to " appear as a witness ". It follows that the protection afforded to an accused in so far as it is related to the phrase " to be a witness " is not merely in respect of testimonial compulsion in the Court-room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.
>
> Considered in this light, the gurantee under Article 20 (3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them."

These observations were unnecessary in *Sharma's case*[1], having regard to the fact that this Court held that the seizure of documents on a search warrant was not unconstutitional as that would not amount to a compulsory production of incriminating evidence. In the present case, even on what was stated in *Sharma's case*[1] there was no formal accusation against the appellant relating to the commission of an offence. Mr. Kaliyappan had clearly stated that he was not doing any investigation. It does not appear from his evidence that he had even accused the appellant of having committed any offence. Even if it were to be assumed that the appellant was a person accused of an offence the circumstances do not establish that he was compelled to produce the money which he had on his person. No doubt he was asked do so. It was, however, within his power to refuse to comply with Mr. Kaliyappan's request. In our opinion, the facts established in the present case show that the appellant was not compelled to produce the currency notes and therefore do not attract the provisions of Article 20 (3) of the Constitution.

As to the third point, we have read the evidence in the case, the judgments of the Special Judge, and of the High Court and have no hesitation in saying that the High Court's view that the judgment of the Special Judge was perverse is correct. This is an appeal on a certificate and the findings on questions of fact are not concurrent. Accordingly, we can form our own conclusion irrespective of the grounds given by the High Court for believing that the grounds given by the Special Judge for distrusting Kaliyappan's evidence were perverse. Those grounds have, however, been placed before us and after a careful examination of them we have come to the conclusion that the grounds given by the Special Judge for distrusting Mr. Kaliyappan's evidence are perverse. It was suggested that the documentary evidence and the manner in which Mr. Kaliyappan gave his evidence indicated that in the quarrel between the village munsif and the appellant he was siding with the village munsif. Assuming that to be so, though we make it quite clear that we do not hold it to be so, it is impossible to believe that Mr. Kaliyappan would have concocted a false case of an attempt made by the appellant to bribe him if he had not

1. (1954) 1 M.L.J. 680 : (1954) S.C.J. 428 : 1954 S.C.R. 1077.

done so. He could have quiet easily told the appellant to leave his bungalow without concocting a false case against him. If he was siding with the village munsif he could have as easily got his subordinate Police Officers to report that the village munsif s'story was true and that the appellant should be prosecuted. There seems to be no occasion for him to have made an elaborate story of an attempt on the part of the appellant to bribe him when, in fact, the appellant had done nothing of the kind. A great deal of emphasis was laid on the fact that in the information which Mr. Kaliyappan sent to the Magistrate he had made no mention of money being offered to him in an envelope and that the torn bits of paper found outside the window of Mr. Kaliyappan's office were not proved to be part of the envelope in which the bribe had been offered and that it was also not at all clear that the Rs. 500 found on the person of the appellant were actually the currency notes offered to Mr. Kaliyappan as bribe. It seems to us, however, that too much emphasis has been laid on all this. Mr. Kaliyappan had certainly alleged in his information to the Magistrate that the appellant had offered him a bribe of Rs. 500. Whether that was the sum in the envelope or whether it had been offered in an envelope was beside the point. The important question for consideration was whether Mr. Kaliyappan had been offered a bribe by the appellant. For that purpose it was a relevant circumstance that in fact on his person the appellant had a sum of Rs 500 and that if Mr. Kaliyappan's story was true that it was offered in an envelope, no envelope was produced with the currency notes of Rs. 500 which were placed on the table. On the other hand, torn bits of paper which could form an envelope were found outside the window of the room where the bribe had been offered. It seems to us on a careful reading of Mr. Kaliyappan's evidence that he had substantially told the truth and that there was no real reason for him to concoct a false case against the appellant. Having regard to the circumstances in which the bribe was offered, corroboration of his evidence in that respect could hardly be expected. His conduct, however, throughout showed that he had acted in a *bona fide* manner. After a careful consideration of his evidence and of the circumstances established in the case we entirely agree with the High Court that there was no real ground upon which his evidence could be disbelieved. In the circumstances, the High Court was entirely justified in acting upon it and setting aside the order of acquittal made by the Special Judge.

Lastly, on the question of sentence, it may be mentioned at once that on the second day of the hearing of this appeal, learned advocate for the appellant stated that his client threw himself at the mercy of the Court and apologized for what had happened. The learned advocate further urged that the appellant, though an Indian citizen, was carrying on business in Burma and had a visa from the Burmese Government for permanent residence and that unless he returned to Burma by the 2nd of March he would lose the benefit of the visa and would no longer be allowed to reside in Burma as a permanent resident. Consequently, he would lose his entire business and property in that country which would be a severe penalty if his sentence of imprisonment was upheld. It is also pointed out that on two occasions this Court on this very ground, on the appellant furnishing security and giving an undertaking to return to this country, had allowed him to go to Burma in order that he might not contravene the conditions of his visa. It was further pointed out that the incident took place in June, 1954, some 5 years and eight months ago. Even a substantial fine in lieu of the sentence of imprisonment would be sufficient punishment and a deterrent to the appellant. We have given the matter of sentence our anxious consideration. It seems, *prima facie*, that a sentence of 6 months' imprisonment and a fine of Rs. 1,000 could not be said to be severe for an offence of the kind established against the appellant. The circumstances mentioned above, if correct, in plea of mitigation of sentence may attract attention but so far as a Court of law is concerned, judicially, it is impossible to say that the sentence imposed by the High Court is severe in a case where there had been an attempt to corrupt a responsible public servant.

The appeal is accordingly dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, K. N. WANCHOO AND J. C. SHAH, JJ.

M/s. Alopi Parshad and Sons, Limited .. *Appellants**

v.

The Union of India .. *Respondent.*

Arbitration—Award—Jurisdiction of Court to set aside on ground of error—Extent.

Contract—Liability under—If can be absolved on account of uncontemplated turn of events?

The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous. If, however, a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside. If the reference is of a specific question of law, even if the award is erroneous, the decision being of arbitrators selected by the parties to adjudicate upon those questions, the award will bind the parties. Where however the reference made was a general reference and not a specific reference on any question of law, the award may be set aside if it be demonstrated to be erroneous on the face of it.

The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of event (namely, heavy increase in prices of the commodity contracted for on account of the outbreak of war) the performance of the contract may become onerous. In India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, " completely outside the contemplation of parties " at the time when the contract was entered into will justify a Court, while holding the parties bound by the contract, in departing from the terms thereof.

The arbitrators in the instant case were not justified in ignoring the express terms of the contract prescribing remuneration payable to the agents, and in proceeding upon the basis of *quantum meruit.* The claim of the agents is not one for indemnity. For work done or services rendered pursuant to the terms of a contract, compensation *quantum meruit* cannot be awarded where the contract provides for the consideration payable in that behalf. *Quantum meruit* is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable.

Appeal from the Judgment and Order, dated the 25th May, 1956, of the Punjab High Court in F.A. O. No. 89/D of 1955.

N. C. Chatterjee, Senior Advocate (*S. K. Kapur, N. H. Hingorani* and *Ganpat Rai*, Advocates, with him), for Appellants.

H. J. Umrigar and *T. M. Sen*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—On May 3, 1937, Messrs. Alopi Parshad and Sons Ltd., who will hereinafter be referred to as the Agents, were, under an agreement in writing, appointed by the Governor-General for India in Council, as from October 1, 1937, agents for purchasing *ghee* required for the use of the Army personnel. The Government of India, by clause 12 of the agreement, undertook to pay to the Agents the actual expenses incurred for purchasing *ghee*, cost of empty tins, expenses incurred on clearance of Government tins from the railway, export land-customs duty levied on *ghee* purchased and exported from markets situated in Indian States, octroi duty terminal tax or other local rates on *ghee*, and certain other charges incurred by the Agents. The Government also agreed to pay to the Agents at rates specified in the agreement :

(1) the financing and overhead (*mandi*) charges incurred in the buying markets,

(2) the cost of establishments and contingencies provided by the Agents on the Government's account for carrying out the purchase and supply of ghee, and

* Civil Appeal No. 693 of 1957. 20th January, 1960.

(3) the buying remuneration.

In consideration of the Government paying to the Agents a sum of rupee one and anna one only per one hundred pounds nett weight of finally accepted *ghee*, as combined financing and overhead (*mandi*) charges, the Agents by clause 13 undertook to provide the working capital and also to bear the costs, charges and expenses, including financing and overhead charges incurred by them in buying *ghee* in the market.

The Agents also undertook, by clause 14, to bear the establishment and contingency charges for the due performance by them of the terms of the agreement, and the Government agreed to pay in consideration thereof annas 14 and pies 6 per every hundred pounds of *ghee* accepted. The Government also agreed to pay to the Agents remuneration for services rendered in purchasing *ghee*, at the rate of one rupee per one hundred pounds nett weight of accepted *ghee*.

Pursuant to the agreement, the Agents supplied from time to time ghee to the Government of India, as required. In September, 1939, the World War II broke out, and there was an enormous increase in the demand by the Government of *ghee*. On June 20, 1942, the original agreement was, by mutual consent, revised, and in respect of the establishment and contingencies, the uniform rate of annas 14 and 6 pies per hundred pounds of accepted *ghee*, was substituted by a graded scale; for the first 5 thousand tons, the Agents were to be paid at the rate of Re. 0-14-6 per hundred pounds, for the next five thousand tons, at the rate of annas 8 per hundred pounds, and at the rate of annas 4 per hundred pounds, for supplies exceeding ten thousand tons. Even in respect of remuneration for services, a graded scale was substituted for the first five thousand tons, remuneration was to be paid at the rate of Re. 1 per hundred pounds, at the rate of annas 8 per hundred pounds, for the next five thousand, and annas 4 per hundred pounds, for supplies exceeding ten thousand tons. This modification in the rates became effective from September 11, 1940.

By their communication, dated December 6, 1943, the Agents demanded that the remuneration, establishment and contingencies, and *mandi* and financing charges, be enhanced. In respect of the buying remuneration, they proposed a 25 per cent. increase; in respect of establishment and contingencies, they proposed an increase of 20 per cent., and in respect of *mandi* and financing charges, an increase of 112 per cent. This revision of the rates was claimed on the plea that the existing rates, fixed in peace time, were "entirely superseded by the totally altered conditions obtaining in war time." To this letter, no immediate reply was given by the Government of India, and the Agents continued to supply *ghee* till May, 1945. On May 17, 1945, the Government of India, purporting to excercise their option under clause 9 of the agreement, served the Agents with a notice of termination of the agreement. On May 22, 1945, the Chief Director of Purchases, on behalf of the Government of India replied to the letter, dated December 6, 1943, and informed the Agents that normally no claim for revision of rates could be entertained during the currency of the agreement and especially with retrospective effect, but a claim for *ex-gratia* compensation to meet any actual loss suffered by an agent, might be entertained, if the Agents established circumstances justifying such a claim. The Chief Director of Purchases called upon the Agents to submit the report of their auditors on the agency accounts, for the *ghee* supplied, as also a statement in detail, showing the actual expenditure incurred.

The notice, dated May 17, 1945, was waived by mutual consent, and under an arrangement, dated May 16, 1946, the Agents agreed to supply five thousand tons of *ghee* by October 31, 1946, on which date, the agreement, dated May 3, 1937, was to come to an end.

By their letter, dated July 1, 1946, the Agents claimed that a dispute had arisen under the contract, and appointed one Nigam to be arbitrator on their behalf to adjudicate upon the dispute, pursuant to clause 20 of the terms of the agreement, dated

May 3, 1937, and called upon the Government of India to appoint their arbitrator. The Government if India, by their letter, dated July 10, 1946, nominated one Rangi Lal to be arbitrator on their behalf. Before the arbitrators, the agents made their claim under four heads :

(1) The Agents claimed that the agreement, dated June 29, 1942, was not binding upon them, and they were entitled to Rs. 23,08,372-8-0 being the difference between the buying remuneration, establishment and contingency charges due under the agreement dated May 3, 1937, and the amount actually received. The details of this claim were set out in Schedule A.

(2) In the event of the arbitrators' holding the agreement, dated June 20, 1942, was binding, a revision of the rates for establishment and contingencies and an additional amount of Rs. 6,91,600-4-0 at such revised rates as set out in Schedule B.

(3) Revision of the rates fixed under the agreement, dated June 20, 1942, of the *mandi* charges, and an additional amount of Rs. 14,47,204-6-3, at the revised rates as set out in Schedule C.

(4) Damages for wrongful termination of the agreement in the month of October, 1946, amounting to Rs. 2,41,235 as set out in Schedule D.

The arbitrators did not arrive at any agreed decision, and the dispute was referred to Lala Achru Ram who was nominated an umpire. The umpire was of the view that the agreement, dated June 20, 1942, was valid, and the claim as set out in Schedule A was untenable ; that the claims set out in Schedule B and Schedule C, did not arise out of the agreement, and he had no jurisdiction to adjudicate upon the same ; and that as the claim set out in Schedule D was outside the scope of the Reference, he was incompetent to give any finding on that claim.

This Award was filed in the Court of the Subordinate Judge, First Class, Delhi. The Agents applied to set aside the Award on the grounds that the umpire was guilty of misconduct in that he failed to give an adequate opportunity to the Agents to present and substantiate their case before him, and that in holding that the claims as described in Schedules B, C, and D, either did not arise out of the agreement or were outside the scope of the Reference, the umpire erred. The learned Subordinate Judge held that the umpire was in error in leaving undertermined claims described in Schedule B and Schedule D, which were within the scope of the Reference, and that the claim described in Schedule C was properly left undecided as it was outside the scope of the Reference. He also held that the Award was vitiated on account of judicial misconduct, because the Agents were not allowed by the umpire sufficient opportunity to place their case. The learned Subordinate Judge, in that view, proceeded to set aside the Award, but he declined to supersede the Reference, and left it to the parties to " appoint other arbitrators in view of clause 20 of the agreement, for settling the dispute ".

Against the order of the Subordinate Judge, the Union of India appealed to the High Court of East Punjab. Khosla, J., who heard the appeal, confirmed the order passed by the Court of first instance. The learned Judge agreed with the view of the Subordinate Judge that the umpire had been guilty of judicial misconduct. The learned Judge observed in his judgment that the claim of the Agents, as described in Schedules B and C, was not beyond the arbitration agreement. In so observing, presumably, the learned Judge committed some error. The Subordinate Judge had come to the conclusion that the claim described in Schedule C, was beyond the arbitration agreement, and no reasons were given by Khosla, J., for disagreeing with that view.

Appeal No. 31 of 1953 under the Letters Patent, against the judgment of Khosla, J., was dismissed by a Division Bench of the High Court of East Punjab, observing that the claim detailed in Schedule B arose out of the contract, but that it was unnecessary to decide whether the claim described in Schedule C, for an increase in the financing and overhead *mandi* charges, was properly ruled out by the umpire.

In the meantime, by letter, dated August 2, 1952, the Agents called upon the Government of India to appoint their arbitrator under clause 20 of the agreement,

dated May 3, 1937, for a fresh adjudication of the dispute, and intimated that they had again appointed Nigam to be their arbitrator. The Government of India informed the Agents by their letter, dated August 14, 1952, that they had filed an appeal against the judgment of the Subordinate Judge, Delhi, and in the circumstances, the question of appointing an arbitrator, did not arise until the final disposal of the appeal. The Government, however, without prejudice to their rights, including the right to prosecute the appeal, again appointed Rangi Lal to be arbitrator on their behalf.

After the Appeal under the Letters Patent was decided by the East Punjab High Court on December 16, 1953, the arbitrators entered upon the reference. On March 1, 1954, the Agents submitted their claim, contending that the supplementary agreement dated June 20, 1942, was void and not binding upon them, and that in any event on the representations made on December 6, 1943, and from time to time thereafter, they were assured by the Chief Director of Purchases that the claim made by them would be favourably considered by the Government of India, and relying on these assurances, they continued to supply *ghee* in quantities demanded by the Government after incurring " heavy extra expenditure ". They also claimed that they were constantly demanding an increase in the *mandi* and financing charges, but the Chief Director of Purchases, who was duly authorized in that behalf by the Government, gave repeated verbal assurances that their demands would be satisfied, and requested them to continue supplies for the successful prosecution of the war. Contending that the Government of India was estopped from repudiating their claim set out in Schedules B and C, in view of all the facts and circumstances stated in the petition, the Agents prayed for a declaration that the supplementary agreement dated June 20, 1942, was void and not binding upon them, and for a decree for payment of Rs. 27,48,515 with interest at the rate of 6 per cent. per annum from March 1, 1954, and in the alternative, for a decree for Rs. 25,63,037-7-3, with interest at the rate of 6 per cent. per annum from March 1, 1954, till recovery. This claim of the Agents was resisted by the Government of India. *Inter alia*, it was deniedthat any assurances were given by the Director of Purchases, or that the Agents continued to supply *ghee* relying upon such alleged assurances. It was asserted that the Agents continued to supply *ghee* without insisting upon any modification of the agreement, because they found, and it must be presumed that they found it profitable to do so under the terms fixed under the supplementary contract, dated June 20, 1942. The claims made for the additional buying remuneration, for *mandi* charges and for establishment and contingency charges, were denied. It was urged that, in any event, the claim for additional buying remuneration and for *mandi* charges and for reimbursement of establishment and contingencies, was not covered by clause 20 of the agreement, under which the submission to arbitration was made, and the arbitrators had no jurisdiction to adjudicate upon those claims.

On the claim made by the Agents, and the denial thereof, the arbitrators incorporated the points of contest in the form of certain issues. On May 2, 1954, the arbitrators made an award rejecting the primary claim on the view that the supplementary agreement, dated June 20, 1942, was for consideration and the same was valid and binding upon the Agents. On the alternative claim, they awarded, under the head of establishment and contingencies, Rs. 80,994-12-6, being the actual loss which, in their view, the Agents had suffered, and Rs. 11,27,965-11-3, in addition to the amount received by the Agents from the Government for *mandi* and financing charges. The arbitrators accordingly awarded an amount of Rs. 13,03,676-12-6 with future interest from November 15, 1949, till the date of realization, and costs.

The award was filed in the Court of the Commercial Subordinate Judge, Delhi, on June 2, 1954. The Government of India applied under sections 30 and 33 of the Indian Arbitration Act, to set aside the award on the grounds that it was invalid, that it had been improperly procured, and that it was vitiated on account

of judicial misconduct of the arbitrators. The Commercial Subordinate Judge held that the arbitrators had committed an error apparent on the face of the award in ordering the Union to pay to the Agents additional remuneration and financing and overhead charges, but, in his view, specific questions having been expressly referred for adjudication to the arbitrators, the award was binding upon the parties and could not be set aside on the ground of an error apparent on the face thereof. The learned Judge, accordingly, rejected the application for setting aside the award.

Against the order made by the Subordinate Judge, an appeal was preferred by the Union of India to the High Court of East Punjab at Chandigarh. At the hearing of the appeal, counsel for the Agents sought to support the award on the plea that certain questions had been specifically referred to the arbitrators, and it was open to the arbitrators to make the award which they made, on the basis of *quantum meruit*. The High Court held that there was no specific reference of any questions of law to the arbitrators, and the decision of the arbitrators was not conclusive and was open to challenge, because it was vitiated by errors apparent on the face of the award. The High Court reversed the order passed by the Subordinate Judge, and set aside the award of the arbitrators, holding that there was no " legal basis for awarding any compensation " to the Agents for any loss which they might have sustained. This appeal has been filed with leave of the High Court under Clause 133 (1) (*a*) of the Constitution.

The extent of the jurisdiction of the Court to set aside an award on the ground of an error in making the award is well-defined. The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous—*Champsey Bhara and Company* v. *Jivaraj Ballo Spinning and Weaving Company Limited*[1]. If, however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside—*In the matter of an arbitration between King and Duveen and others*[2], and *Government of Kelantan* v. *Duff Development Company Ltd.*[3]

Was the reference made by the parties to the arbitrators a specific reference, that is, a reference inviting the arbitrators to decide certain questions of law submitted to them ? If the reference is of a specific question of law, even if the award is erroneous, the decision being of arbitrators selected by the parties to adjudicate upon those questions, the award will bind the parties. In the reference originally made to the arbitrators by the letter of the Agents on July 1, 1946 and the reply of the Government dated July 10, 1946, a general reference of the dispute was made in terms of clause 20 of the agreement. Even though the award made on that reference, was set aside by the Subordinate Judge, the arbitration was not superseded, and the reference was expressly kept alive, reserving an opportunity to the parties to appoint fresh arbitrators pursuant to the agreement, for settling the dispute ; and by letters respectively, dated August 2, 1952, and August 14, 1952, a general reference was again made to the arbitrators. Paragraph 14 of the letter written by the Agent on August 2, 1952, evidences an intention to serve the notice under clause 20 of the agreement. Issues were undoubtedly raised by the arbitrators, but that was presumably to focus the attention of the parties on the points arising for adjudication. The Agents had made their claim before the arbitrators, and the claim and the jurisdiction of the arbitrators to adjudicate upon the claim, were denied. The arbitrators were by the terms of reference only authorized to adjudicate upon the disputes raised. There is no foundation for the view that a specific reference, submitting a question of law for the adjudication of the arbitrators was made.

1. (1923) L.R. 50 I.A. 324 : I.L.R. 47 Bom. 578 : 44 M.L.J. 706 (P.C.).
2. L.R. (1913) 2 K.B.D. 32.
3. L.R. 1923 A.C. 395.

We agree, therefore, with the view of the High Court that the reference made, was a general reference and not a specific reference on any question of law. The award may, therefore, be set aside if it be demonstrated to be erroneous on the face of it.

The original agreement, dated May 3, 1937, was modified by the supplementary agreement, dated June 20, 1942, and the arbitrators have held that the modified agreement was binding upon the Agents. By the agreement as modified, a graded scale was fixed for the establishment and the contingencies to be paid to the Agents, and also for the *mandi* charges and overhead expenses. The arbitrators still proceeded to award an additional amount for establishment and contingencies and an additional amount for *mandi* charges. By clause 14 (*a*), read with clause 12 (*b*) (2) of the agreement, the rate at which establishment and contingency charges were to be paid, was expressly stipulated and there is no dispute that the Government of India have paid to the Agents those charges at the stipulated rate for *ghee* actually purchased. The award of the arbitrators shows that the amount actually received from the Government, totalled Rs. 6,04,700-9-0, whereas, according to the accounts maintained by the Agents, they had spent Rs. 6,77,542-0-3. Granting that the Agents had incurred this additional expenditure under the head 'establishment and contingencies,' when the contract expressly stipulated for payment of charges at rates specified therein, we fail to appreciate, on what ground, the arbitrators could ignore the express covenants between the parties, and award to the Agents amounts which the Union of India had not agreed to pay to the Agents. The award of the arbitrators, awarding additional expenses under the head of establishment and contingencies, together with interest thereon, is on the face of it erroneous.

Before the arbitrators, a number of *arhatias*, who supplied *ghee* to the Agents, appeared and produced extracts from their books, showing the amounts actually due to them from the latter. Detailed charts, showing the total amount due under each head of expenditure to each *arhatia*, were produced. The arbitrators were satisfied that the statements produced, reflected a general rise in prices and cost of labour. Taking into consideration the fact that the other persons were buying *ghee* at rates considerably in excess of the stipulated rates, the arbitrators held that the Agents were entitled to be reimbursed to the extent of Rs. 11,27,965-11-3. But the terms of the contract, stipulating the rate at which the financing and overhead charges were to be paid under clause 13 (*a*) read with clause 12 (*b*), remained binding so long as the contract was not abandoned or altered by mutual agreement, and the arbitrators had no authority to award any amount in excess of the amount expressly stipulated to be paid. Mr. Chatterjee, on behalf of the Agents, submitted that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War, and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not in view of the turn of events which were never in the contemplation of the parties, remain binding upon the Agents. This argument is untrue in fact and unsupportable in law. The contract was modified on June 20 1942, by mutual consent, and the modification was made nearly three years after the commencement of the hostilities. The Agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, continugencies and buying remuneration, was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made, are altered.

Section 56 of the Indian Contract Act provides that :

> "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful".

Performance of the contract had not become impossible or unlawful ; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable

a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the Court reaches a conclusion which is 'just and reasonable' (Lord Wright in *Constantine's case*[1]) or one 'which justice demands' (Lord Sumner in *Hirj Mulji* v. *Cheong Yue Steamship Co., Ltd.*[2]), this result is arrived at by putting a just construction upon the contract in accordance with an 'implication. . . . . from the presumed common intention of the parties'" speech of Lord Simon in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[3].

There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract. Mr. Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[4] In that case, Denning, L.J., is reported to have observed :

" . . . . . no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the Court will read the words of the contract in a qualified sense ; it will restrict them to the circumstances contemplated by the parties ; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable"

But the observations made by Denning, L.J., upon which reliance has been placed, proceeded substantially upon misapprehension of what was decided in *Parkinson & Co. Ltd.* v. *Commissioner of Works*[5], on which the learned Lord Justice placed considerable reliance. The view taken by him was negatived in appeal to the House of Lords in the *British Movietonews case*[3], already referred to. In India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a Court, while holding the parties bound by the contract, in departing from the express terms thereof. *Parkinson and Co. Ltd.* v. *Commissioners of Works*[5], was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by Denning, L.J., in the *British Movietonews Ltd* v. *London and District Cinemas Ltd.*[4].

We are, therefore, unable to agree with the contention of Mr. Chatterjee that the arbitrators were justified in ignoring the express terms of the contract prescribing

1. L.R. (1942) A.C. 154, 186.
2. L.R. (1926) A.C. 497, 510.
3. L.R. 1952 A.C. 166 at 185, 186.
4. L.R. (1951) 1 K.B.D. 190, 201.
5. L.R. (1949) 2 K.B.D. 632.

remuneration payable to the Agents, and in proceeding upon the basis of *quantum meruit.*

Relying upon section 222 of the Indian Contract Act, by which duty to indemnify the agent against the consequences of all lawful acts done in excercise of the authority conferred, is imposed upon the employer, the arbitrators could not award compensation to the Agents in excess of the expressly stipulated consideration. The claim made by the Agents was not for indemnity for consequences of acts lawfully done by them on behalf of the Government of India ; it was a claim for charges incurred by them in excess of those stipulated. Such a claim was not a claim for indemnity but a claim for enhancement of the rate of the agreed consideration. Assuming that the Agents relied upon assurances alleged to be given by the Director in charge of Purchases, in the absence of an express covenant modifying the contract which governed the relations of the Agents with the Government of India, vague assurances could not modify contract. *Ghee* having been supplied by the Agents under the terms of the contract, the right of the Agents was to receive remuneration under the terms of that contract. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of *quantum meruit.* Compensation *quantum meruit* is awarded for work done or services rendered when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation *quantum meruit* cannot be awarded where the contract provides for the consideration payable in that behalf. *Quantum meruit* is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable. It is, therefore, unnecessary to consider the argument advanced by Mr. Chatterjee that a claim for compensation on the basis of *quantum meruit,* is one which arises out of the agreement within the meaning of clause 20. Granting that a claim for compensation on the basis of *quantum meruit,* may be adjudicated upon by the arbitrators in a reference made under clause 20 of the agreement, in the circumstances of the case before us, compensation on that basis could not be claimed.

The plea that there was a bar of *res judicata* by reason of the decision in the Letters Patent Appeal No. 31 of 1953, has, in our judgment, no force. The Subordinate Judge set aside the award on the ground that there had been judicial misconduct committed by the umpire and also on the view that the claims made, as described in Schedules B and D, were not outside the competence of the arbitrators. The High Court in appeal under the Letters Patent, did confirm the order, setting aside the award ; but there was no binding decision between the parties that the claim described in Schedule B, that is, the claim for establishment and contingency charges was within the competence of the arbitrators in reference unde rclause 20. It may be observed that according to the High Court of East Punjab in the Appeal No. 31 of 1953, under the Letters Patent, it was not necessary to express any opinion whether the claim in Schedule C was within the competence of the arbitrators, and the claims described in Schedule D does not appear to have been agitated in the second arbitration proceeding.

We, accordingly, agree with the view of the High Court that the Award of the arbitrators was liable to be set aside because of an error apparent on the face of the award. In this view, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

The Bihar State Co-operative Bank, Ltd. .. *Appellant**

v.

The Commissioner of Income-tax .. *Respondent.*

Income-tax Act (XI of 1922)—Interest on fixed deposits earned by Co-operative Bank—If its business profits exempt from tax under C.B.R. Notification No. 35 of 20th October, 1934 and No. 33 of 18th August, 1945.

It is a normal mode of carrying on banking business to invest moneys in a manner that they are readily available and that is just as much a part of the mode of conducting a Bank's business as receiving deposits or lending moneys or discounting hundies or issuing demand drafts. That is how the circulating capital is employed and that is the normal course of business of a bank. The moneys laid out in the form of deposits (as in the instant case by a Co-operative Bank) would not cease to be a part of the circulating capital of such Bank nor would they cease to form part of its banking business. The returns flowing from them would form part of its profits from its business. As interest derived from such deposits arise from the business of the Bank it is income exempted under C.B.R. Notifications, No. 35 of 20th October, 1934 and No. 33 of 18th April, 1945.

Appeals from the Judgment and Decree, dated the 2nd July, 1957, of the Patna High Court in Misc. Judicial Case No. 640 of 1955.

N. A Palkhivala, Thakur Prasad and *R. C. Prasad,* Advocates, for Appellant.

C. K. Daphtary, Solicitor-General of India (*R. Ganapathy Iyer* and *D. Gupta,* Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—The appellant is a Bank registered under the Co-operative Societies Act, 1912 (Act II of 1912) and is deemed to be registered under the Bihar and Orissa Co-operative Societies Act, 1935 (Bihar Act VI of 1935) which in Bihar has replaced the Co-operative Societies Act of 1912. It was carrying on banking business in the State of Bihar. One of the objects of the Bank is to carry on general business of banking not repugnant to the provisions of the Bihar Act and Rules framed thereunder for the time being in force (Bye-Law 3 (*a*) (vi)). In the calendar years 1945, 1946 and 1947, the appellant Bank received by way of interest on deposits with the Imperial Bank of India the sums of Rs. 7,192, Rs. 20,250 and Rs. 22,600 respectively. It is these sums which are the subject-matter of dispute in these three appeals which relate to the respective assessment years 1946-1947, 1947-1948 and 1948-1949. These sums were not assessed when assessment was made under section 23 (3) of the Income-tax Act, but subsequently under section 34 they were assessed as being 'income' under the head 'other sources'. This order was upheld by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal. A case was then stated to the High Court under section 66 (1) of the Act, but was decided against the appellant. The appellant brought three appeals in this Court in regard to the three assessment years. In each one of them the respondent is the Commissioner of Income-tax, Bihar and Orissa. As the appeals involve a common question of law they were consolidated and can conveniently be disposed of by one judgment.

In its return the appellant showed these various sums as 'other sources', but nothing turns on the manner in which the appellant chose to show this income in its return. The Income-tax Officer, however, assessed the interest for these three years under section 12 of the Income-tax Act, as income from 'other sources'. The appellant took an appeal to the Appellate Assistant Commissioner where it was contended that as the business of the appellant Bank consisted of lending money and the deposits had been made not for the purpose of investment but for that business and thereby fulfilling the purpose for which the Co-operative Bank was constituted

*Civil Appeals Nos. 228 to 230 of 1958. 22nd February, 1960.

these various sums of interest were not subject to income-tax because of the Notification issued by the Central Government under section 60 of the Income-Tax Act. The relevant portion of that Notification, C.B.R. Notification No. 35, dated October 20, 1934, and No 33, dated August 18, 1945, was :—

"The following classes of income shall be exempt from the tax payable under the said Act, but shall be taken into account in determining the total income of an assessee for the purpose of the said Act........

(2) The profits of any Co-operative Society other than the Sanikatta Salt Owners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act, 1912 (Act II of 1912), the Bombay Co-operative Societies Act, 1925 (Bombay Act VII of 1925), or the Madras Co-operative Societies Act, 1932 (Madras Act VI of 1932), or the dividends or other payments received by the members of any such Society out of such profits.

Explanation : For this purpose the profits of a Co-operative Society shall not be deemed to include any income, profits or gains from :—

(1) Investments in (*a*) securities of the nature referred to in section 8 of the Indian Income-tax Act ; or (*b*) property of the nature referred to in section 9 of that Act ;

(2) dividends, or
(3) the 'other sources' referred to in section 12 of the Indian Income Tax Act ".

The Appellate Assistant Commissioner, however, repelled the contention of the appellant. He held that the business of the appellant consisted of 'lending money, and selling agricultural and other products to its constituents' which could be planned ahead and required no provision for extraordinary claims. He remarked that it appeared from the balance-sheets that in the accounting year 1945 the Bank invested Rs. 13,50,000 as fixed deposits, which, in the following year was raised to Rs. 15,00,000 and it was only in the accounting year 1947 that the fixed deposits 'were realised on maturity with interest'. He was also of the opinion that the length of the period during which this money 'was kept locked in this way' showed clearly that 'not the exigencies of pressing necessities, but the motives of investment of surplus fund had actuated the deposits'. He, therefore, held that the fixed deposits with the Imperial Bank were held as an investment quite apart from the business of the appellant and the interest from these deposits was not exempt from income-tax. He further held that the exemption as to the profit of a Co-operative Society extended to its sphere of co-operative activities and therefore interest from investments was no part of the appellant's business profits exempt from taxation. Against this order an appeal was taken to the Income-tax Appellate Tribunal and it was there contended that the Bank did not make the deposits as investments, but in order that cash might be available to the appellant 'continuously' for the carrying on of the purposes of its business, and that the deposits were intimately connected with the business of the appellant and therefore the interest should have been held to be profits arising from the business activities of the Bank, and that the finding that the short-term deposits in the Imperial Bank were separate from the appellant's banking business was erroneous. The Income-tax Appellate Tribunal, by its order dated April 11, 1955, held :—

"(1) That the interest was an income rightly to be included under the head of 'other sources.'

....

(2) The profits of a Co-operative Society indicates the profit derived from the business which can be truly called the business of the Co-operative Society. Investments by the society either in securities or in shares or in bank fixed deposits are made out of surplus funds. The interest or dividend derived from such investment cannot be regarded as part of the profits of the business (sic) *qua* such bank and therefore, it is not exempt from income-tax (Vide *Hoshiarpur Central Co-operative Bank* v. *Commissioner of Income-tax* [1].")

Against this order a case was stated at the instance of the appellant under section 66 (1) of the Act, and the following two questions of law were referred for the opinion of the High Court :

"(1) Whether, in the facts and circumstances of this case, the receipt of interest on fixed deposits was an income under the head of 'other sources'; and

1. (1953) 24 I.T.R. 346, 350.

(2) Whether in the facts and circumstances of this case, the receipt of interest from the fixed deposits was an income not exempt from taxation under the C.B.R. Notification No. 35, dated 20th October, 1934 and No. 33, dated the 18th August, 1945."

In the High Court the appellant's contention was that the fixed deposits were made with the Imperial Bank of India not with the idea of making investments, but for the reason that cash should be available to the appellant as and when it was needed for the purposes of its business. It was also contended that the deposits were short-term deposits and that the Bank could not carry on its business without such short-term deposits. In other words, the contention was that making deposits with the Imperial Bank was intimately connected with the business activities of the appellant bank and that the interest received on the deposits was profit attributable to its business activities. But the High Court did not accept this contention. It held that if the income derived by a Co-operative Society was from the business of the Co-operative Society as such, it fell within the exemption, but if it arose out of the business with third parties as in the case of investment of surplus assets, the exemption was inapplicable because the investment of fluid assets was not a part of the business of the Co-operative Bank and the reason for the Notification was to exempt profits accruing to a Co-operative Society from "carrying on business of a mutual co-operative society and upon the ground that a man cannot make profit or loss out of himself".

The ground of mutuality was not relied upon before us by the learned Solicitor-General who appeared for the respondent. So the sole question for determination is whether the investment by a Co-operative Bank of its assets in fixed deposits in the manner that the appellant Bank had deposited its moneys falls within the term 'business' and is therefore assessable under section 10 of the Income-tax Act, or it is an investment the interest from which would fall under the term 'other sources' and therefore within section 12 of the Income-tax Act. It was contended by the learned Solicitor-General that the finding of the Appellate Tribunal as to the nature of these deposits was one of fact. This contention is not sustainable. It has not been treated as a finding of fact either by the Appellate Tribunal or by the High Court. They have both treated it as a question of law and it is on that basis that the reference was made. The decision of the question depends on what is comprised within the ordinary business of a bank and whether the business of the appellant bank is in any way different.

Relying upon the decision of the Privy Council in *The Punjab Co-operative Bank Ltd.* v. *The Commissioner of Income-tax, Punjab*[1], counsel for the apellant submitted that the business of a bank is one of dealing in money and credit and that laying out moneys in deposit with other banks is just as much a mode of conducting business as lending moneys to borrowers whether members of the society or to other co-operative societies and is therefore a part of the appellant's business. Therefore, where out of moneys in deposit with a bank a portion is put away or laid out in securities or in deposits with another banker, two objects are served: (1) the moneys which are not immediately required do not remain idle but earn interest; and (2) if and when money is required to meet any demand, the investment, *i.e.*, the deposits as well as the securities provide a source from which these requirements can easily be met. Thus the credit of the bank remains unimpaired and its moneys continue to earn interest.

Counsel for the respondents argued that where moneys are so laid out they cannot be termed 'carrying on business of the bank' and therefore any sums coming in from such investments cannot be termed profits arising from business, but they are income from 'other sources'. In support of this argument reliance was placed by counsel on *The Madras Central Urban Bank Ltd.* v. *Commissioner of Income-tax*[2]; *The Madras Provincial Co-operative Bank Ltd., Madras* v. *Commissioner of Income-tax, Madras*[3]; *Commissioner of Income-tax, Burma* v. *Bengalee Urban Co-operative Credit Society Ltd.*[4];

1. (1940) L.R. 67 I.A. 464 : 8 I.T.R. 635 : (1941) 1 M.L.J. 130 (P.C.).
2. (1929) I.L.R. 52 Mad. 640 : 56 M.L.J. 481 (F.B.).
3. (1933) 64 M.L.J. 640 : I.L.R. 56 Mad. 837 (F.B.).
4. (1934) 2 I.T.R. 121

Commissioner of Income-tax, Madras v. *Madras Provincial Co-operative Bank Ltd.*[1]; *Hoshiarpur Central Co-operative Bank Ltd.* v. *Commissioner of Income-tax, Simla*[2]; *Cochin Cottage Industries Co-operative Marketing Society Ltd.* v. *Commissioner of Income-tax, Mysore, etc*[3]. But none of these cases supports the argument raised on behalf of the respondent. In the *Madras Central Urban Bank case*[4], the society was required to invest 40 per cent. of its total liability under call deposits in a liquid or fluid form and the society invested it in Government securities which produced interest. It was held that interest from securities was not part of the profits of the business of the society as it was not obliged to invest in such securities. Similarly in the *Madras Provincial Co-operative Bank Case*[5] also the income which was the subject-matter of dispute was interest received by the bank from its investment in Government securities and it was held that it was not part of the income derived from its business. The Rangoon case, *Commissioner of Income-tax, Burma* v. *Bengalee Urban Co-operative Credit Society*[6], was also a case relating to income derived from interest on capital invested in Government securities. At page 128, Page, C.J., said :

> "..........................and *prima facie* therefore neither interest from securities nor income derived from property are 'profits' within the meaning of that term as used in the notification..........................It may be that investment of capital in properties or securities is part of the business of an assessee, and in such a case, in my opinion, the net income accruing from such investments would be, and be chargeable as, profits of the business".

(As the matter has not been considered from this point of view, the case was sent back for doing so).

These cases before the amendment of the Notification show that the income which was exempted was profit from business and not income from sources which fell under sections 8 and 9 of the Income-tax Act. *The Commissioner of Income-tax, Madras* v. *The Madars Provincial Co-operative Bank Ltd.*,[7] was a case where moneys had been invested in debentures and for reasons similar to the ones given in the cases abovementioned, it was held that interest derived therefrom was not profits of the business.

Counsel for the respondent relied on a judgment of the Punjab High Court in *Hoshiarpur Central Co-operative Bank* v. *Commissioner of Income-tax, Simla*[2]. In that case the Government authorised the Bank to deal in sugar, oil and standard cloth and it made profit therefrom. Those activities were neither its business under the bye-laws nor within its objects. The question was whether this profit was exempt from income-tax on account of its being profits of a co-operative society and it was held that the decided cases showed that where income was derived by a co-operative society, the profits were within the exemption, but not if the business was of the nature not covered by the objects of the society. This line of reasoning has not formed part of the respondent's argument in this Court and the case therefore has no application to the facts of the present case. The decision in *Cochin Cottage Industries Co-operative Marketing Society Ltd.* v. *Commissioner of Income-tax, Mysore, etc.*,[3] proceeded on the same ground. In that case the profit which was held not to be exempt under the Notification was the apportioned profit of the society from its dealings with non-members.

In the *Surat Peoples' Co-operative Bank Ltd.* v. *The Commissioner of Income-tax, Ahmedabad*[8], the profit arose during the course of banking business out of the sale of Government securities which formed part of the stock-in-trade and as it was a co-operative bank the profits made from such sales were held to be exempt from taxation under the Notification.

In the instant case the co-operative society (the appellant) is a Bank. One of its objects is to carry on the general business of banking. Like other banks money is its stock-in-trade or circulating capital and its normal business is to deal in money and

1. (1943) 1 M.L.J. 46 : I.L.R. 1943 Mad. 390.
2. (1953) 24 I.T.R. 346.
3. (1956) 30 I.T.R. 356.
4. (1929) 56 M.L.J. 481 : I.L.R. 52 Mad. 640 (F.B.).
5. (1933) I.L.R. 56 Mad. 837: 64 M.L.J. 640 (F.B.).
6. (1934) 2 I.T.R. 121.
7. I.L.R. (1943) Mad. 390: (1943) 1 M.L.J. 46.
8. (1958) 33 I.T.R. 296.

credit. It cannot be said that the business of such a Bank consists only in receiving deposits and lending money to its members or such other societies as are mentioned in the objects and that when it lays out its moneys so that they may be readily available to meet the demand of its depositors if and when they arise, it is not a legitimate mode of carrying on of its banking business. The Privy Council in *The Punjab Co-operative Bank Ltd.* v. *The Commissioner of Income-tax, Lahore*[1], where the profits arose from the sale of Government securities pointed out at page 645 that in the ordinary cases the business of a Bank essentially consists of dealing with money and credit. Depositors put their money in the Bank at a small rate of interest and in order to meet their demands if and when they arise the Bank has always to keep sufficient cash or easily realisable securities. That is a normal step in the carrying on of the banking business. In other words 'that is an act done in what is truly the carrying on or carrying out of a business.' It may be added that another mode of conducting business of a Bank is to place its funds in deposit with other banks and that also is to meet demands which may be made on it. It was, however, argued that in the instant case the moneys had been deposited with the Imperial Bank on long term deposits inasmuch as they were deposited for one year and were renewed from time to time also for a year ; but as is shown by the accounts these deposits fell due at short intervals and would have been available to the appellant had any need arisen.

Stress was laid on the use of the word 'surplus' both by the Tribunal as well as by the High Court and it was also contended before us that in the bye-laws under the heading 'business of the bank' it was provided that the bank could 'invest' surplus funds when not required for the business of the bank in one or more ways specified in section 19 of the Bihar Act (Clause 4 III (i) of the Bye-Laws). Whether funds invested as provided in section 19 of the Bihar Act would be surplus or not does not arise for decision in this case, but it has not been shown that the moneys which were in deposit with other banks were 'surplus' within that bye-law so as to take it out of banking business. As we have pointed out above, it is a normal mode of carrying on banking business to invest money in a manner that they are readily available and that is just as much a part of the mode of conducting a Bank's business as receiving deposits or lending moneys or discounting hundies or issuing demand drafts. That is how the circulating capital is employed and that is the normal course of business of a bank. The moneys laid out in the form of deposits as in the instant case would not cease to be a part of the circulating capital of the appellant nor would they cease to form part of its banking business. The returns flowing from them would form part of its profits from its business. In a commercial sense the directors of the company owe it to the bank to make investments which earn them interest instead of letting moneys lie idle. It cannot be said that the funds of the Bank which were not lent to borrowers but were laid out in the form of deposits in another bank to add to the profit instead of lying idle necessarily ceased to be a part of the stock in trade of the bank, or that the interest arising therefrom did not form part of its business profits. Under the bye-laws one of the objects of the appellant bank is to carry on the general business of banking and therefore subject to the Co-operative Societies Act, it has to carry on its business in the manner that ordinary banks do. It may be added that the various heads under section 6 of the Income-tax Act and the provisions of that Act applicable to these various heads are mutually exclusive. Section 12 is a residuary section and does not come into operation until the preceding heads are excluded. *Commissioner of Income-tax* v. *Basant Rai Takht Singh*[2].

In our opinion, the High Court was in error in treating interest derived from deposits as not arising from the business of the Bank and therefore not falling within the income exempted under the Notification. The appeal must therefore be allowed and the judgment and order of the High Court set aside. The appellant will have its costs in this Court and in the Court below.

Appeal allowed.

1. (1940) L.R. 67 I.A. 464: 8 I.T.R. 635 : (1941) 1 M.L.J. 130 (P.C.).
2. (1933) I.T.R. 197, 201: L.R. 60 I.A. 307: 65 M.L.J. 247 (P.C.).

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—K. C. DAS GUPTA AND J. C. SHAH, JJ.

Pramatha Nath Mukherjee .. *Appellant**

v.

The State of West Bengal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 251-A—Order of discharge for offence triable as warrant case—If Magistrate can still proceed to try the accused for another offence disclosed by the police report and triable as a summons case.

A Magistrate after making an order of discharge under section 251-A (2), Criminal Procedure Code, in respect of a charge for an offence triable as a warrant case can still proceed to try the accused for another offence disclosed by the police report and triable as a summons case. The Magistrate when he took cognizance under section 190 (1) (*b*), Criminal Procedure Code, of the offence under section 332, Indian Penal Code, cannot but have taken cognizance also of the minor offence under section 323, Indian Penal Code. Consequently even after the order of discharge was made in respect of the offence under section 332, Indian Penal Code, the minor offence under section 323 of which he had also taken cognizance remained for trial for which the procedure under Chapter XX of the Criminal Procedure Code, can be followed.

Appeal from the Judgment and Order, dated the 28th February, 1957, of the Calcutta High Court in Criminal Revision No. 1158 of 1956, arising out of the Judgment and Order, dated the 26th June, 1956, of the Additional Chief Presidency Magistrate, Calcutta, in G.R. Case No. 284 of 1956.

K. R. Chaudhury, Advocate for Appellant.

B. Sen, Senior Advocate (*P. K. Ghosh*, Advocate for *P. K. Bose*, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—The question raised in this appeal is whether a Magistrate after making an order of discharge under section 251-A (2), Criminal Procedure Code, in respect of a charge for an offence triable as a warrant case can still proceed to try the accused for another offence disclosed by the police report and triable as a summons case. The case against the appellant was instituted on a police report which charged him with an offence under section 332 of the Indian Penal Code for

"voluntarily causing hurt by means of a piece of wood to the complainant, Sisir Kumar Bose, Bailiff of Calcutta Corporation and Chandra Sekhar Bhattacharjee, an empoyee of Calcutta Corporation, with the intent to prevent or deter those persons from discharging their duties as public servants".

The Magistrate after satisfying himself that the documents referred to in section 173, Criminal Procedure Code, had been furnished to the accused examined the documents and was of opinion after hearing counsel of both parties that the charge under section 332, Indian Penal Code, could not be sustained. He was, however, of opinion that there was evidence to establish a *prima facie* case under section 323, Indian Penal Code. He accordingly charged the accused under section 323, Indian Penal Code, examined him and when he pleaded not guilty and claimed to be tried posted the case for the examination of prosecution witnesses. On the next hearing date a submission was made on behalf of the accused that in view of the provisions of section 251-A (2), Criminal Procedure Code, the accused should have been acquitted altogther and no trial for the offence under section 323, Indian Penal Code, could be proceeded with. The Magistrate rejected this contention and directed that the trial of the accused for an offence under section 323, Indian Penal Code, would proceed under Chapter XX. That procedure was followed and ultimately the accused was convicted under section 323, Indian Penal Code, and sentenced to pay a fine of rupees fifty only and in default to undergo rigorous imprisonment for one month. The appellant's application under section 439, Crimi-

* Crl. A. No. 116 of 1958. 11th March, 1960.

nal Procedure Code, for revision of this order was rejected by the High Court. The learned Judge was of opinion that

"if the Magistrate finds on the materials before him that a summons case offence has been committed by the accused, he has, the right and duty to proceed in accordance with the provisions of Chapter XX of the Criminal Procedure Code. The word "discharge" used in sub-section (2) of section 251-A, Criminal Procedure Code, must be read as having reference to a discharge in relation to the specific offence upon which the accused has been charge-sheeted. It does not necessarily mean that the accused cannot be proceeded against for some other offence, say a summons case offence under Chapter XX, Criminal Procedure Code"

in spite of the discharge under section 251-A (2). The present appeal is filed on the strength of a certificate granted by the High Court under Article 134 (1) (*c*) of the Constitution.

The relevant provisions of sections 251 and 251-A of the Code of Criminal Procedure are in these words:—

"*Section* 251.—In the trial of warrant-cases by Magistrates, the Magistrates shall—

(*a*) in any case instituted on a Police Report, follow the procedure specified in section 251-A; and

(*b*) in any other case, follow the procedure specified in the other provisions of this Chapter.

Section 251-A. (1) ....

(2) If, upon considerations of all the documents referred to in section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him.

(3) If, upon such documents being considered, such examination, if any, being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused."

It is quite clear that in deciding whether action shall be taken by him under sub-section (2) or sub-section (3) of section 251-A the Magistrate has to form an opinion whether there is any ground for presuming that an accused has committed an offence triable under Chapter XXI or there is no such ground. When his opinion is that there is ground for a presumption that the accused has committed an offence punishable under Chapter XXI which the Magistrate is competent to try and which could be adequately punished by him he shall proceed with the trial. But when he forms the opinion that there is no ground for presuming that an offence punishable under Chapter XXI has been committed by the accused his duty is to discharge the accused. The real question is, when an order of discharge is made by the Magistrate in exercise of the powers under sub-section (2) of section 251-A, is the discharge in respect of all the offences which the facts mentioned in the Police Report would make out? The answer must be in the negative. When the Magistrate makes an order under section 251-A (2) he does so as, after having considered whether the charge made in the Police Report of the offences triable under Chapter XXI is groundless he is of opinion that the charge in respect of such offence is groundless; but the order of discharge has reference only to such offences mentioned in the charge-sheet as are triable under Chapter XXI. It very often happens that the facts mentioned in the charge-sheet constitute one or more offences triable under Chapter XXI as warrant cases and also one or more other offences triable under Chapter XX. The order of discharge being only in respect of the offences triable under Chapter XXI does not affect in any way the position that charges of offences triable under Chapter XX also are contained in the Police Report.

But, says the learned counsel for the appellant, the Magistrate cannot proceed with the trial of these other offences triable under Chapter XX because no cognizances has been taken of such other offences. He contends that only after a fresh complaint has been made in respect of these offences triable under Chapter XX that the Magistrate can take cognizance and then proceed to try them after following the procedure prescribed by law. This argument ignores the fact that when a Magistrate takes

cognizance of offences unser section 190 (1) (b), Criminal Procedure Code, he takes cognizance of all offences constituted by the facts reported by the Police Officer and not only of some of such offences. For example, if the facts mentioned in the Police Report constitute an offence under section 379, Indian Penal Code, as also one under section 426, Indian Penal Code, the Magistrate can take cognizance not only of the offence under section 379 but also of the offence under section 426. In the present case the Police Report stated facts which constituted an offence under section 332, Indian Penal Code, but these facts necessarily constitute also a minor offence under section 323, Indian Penal Code. The Magistrate when he took cognizance under section 190 (1) (b), Criminal Procedure Code, of the offence under section 332, Indian Penal Code cannot but have taken cognizance also of the minor offence under section 323, Indian Penal Code. Consequently, even after the order of discharge was made in respect of the offence under section 332, Indian Penal Code, the minor offence under section 323 of which he had also taken cognizance remained for trial as there was no indication to the contrary. That being an offence triable under Chapter XX, Criminal Procedure Code, the Magistrate rightly followed the procedure under Chapter XX.

The appeal is accordingly dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.

Nanduri Yogananda Lakshminarasimhachari and others .. *Appellants**

v.

Sri Agastheswaraswamivaru .. *Respondent.*

Grant—Inam—Specific endowment to deity or personal grant burdened with service—Test—Surplus income—Cy-pres—Applicability.

"To be confirmed to the party so long as he continues the performance of the services" in the Inam Register is a personal grant but "to be confirmed so long as the service is performed" is not. In the instant case on the evidence and entries in the Inam Registers the property was held to be in the nature of a trust (a specific endowment for *Kalyanothsavam* of the deity and not a personal grant.

Where a grant is to a deity and the income is earmarked for the services for which the specific endowment is created, if there is a surplus which cannot be spent on these services, it would be a case for the application of the *Cy-pres* doctrine.

Appeal from the Judgment and Decree, dated the 7th August, 1952, of the Madras High Court in A.S. No. 809 of 1947, arising out of the Judgment and Decree, dated the 31st October, 1947, of the Sub-Judge, Tenali, in O.S. No. 64 of 1944.

K. R. Chaudhuri, T. S. Venkataraman and *K. R. Sarma*, Advocates, for Appellants.

N. Subramanyam and *T. Satyanarayana*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the judgment and decree of the High Court of Madras varying the decree of the trial Court. The appellants were the defendants in the trial Court and the respondent was the plaintiff who was represented by the sole trustee appointed by the Hindu Religious Endowment Board.

The suit was brought by the deity through the sole trustee for recovery of Rs. 3,480 towards the arrears of income of the property in trustee for the years 1942-44 and for a direction for future payment at the rate of 160 bags of paddy per year or its equivalent *i.e.*, Rs. 1,680. The plaintiff alleged that the property in dispute constituted a specific endowment for *Kalyanotsavam* of the deity and that the defendants who

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* Civil Appeal No. 147 of 1956. 15th January, 1960.

were trustees had committed default in carrying out the purpose of the trust. The prayer was for a decree for the recovery of expenses of *Kalyanotsavam* and of the feeding charges. The defence raised was that the inam was a personal grant for driving the car of the deity on the festival days and that it was not a specific trust or an endowment for the benefit of the idol. In other words it was a grant of the *inam* burdened with service to the god. There were other pleas raised in regard to jurisdiction, *res judicata* and adverse possession. The trial Court held that the grant was a specific endowment for the *Kalyanotsavam* of the deity but the appellants were not bound to spend the whole income of the lands for the purpose. It decreed a sum of Rs. 200 per year as adequate provision for the performance of the service of *Kalyanotsavam*. The other pleas raised were decided against the appellants.

In the High Court the only point argued was regarding the nature of the grant and as in the opinion of that Court a general trustee could not call upon a specific trustee to pay any money except on the ground of expending that amount and there was no proof of this expenditure the prayer as contained in the plaint was not granted and the High Court was also of the opinion that as all the facts had been pleaded and there were no new facts to be alleged and the parties were alive to the real nature of the dispute and had even the issues framed, on that very question, it allowed the plaint to be amended by the addition of the prayer for a declaration that the properties in the schedule and the income thereof formed a specific endowment for the due performance of the services of *Kalyanotsavam* of the deity and feeding charges and other expenses incidental thereto and the appellants were therefore liable to pay the entire income. It was also of the opinion that all the available evidence had been adduced by both the parties that the prayer for declaration was only a formal relief which flowed from the allegations in the plaint. It neither involved a change of the cause of action nor did it require a fresh trial and therefore the petition for amendment was allowed by the addition of the prayer stated above.

In this appeal counsel for the appellant has raised three points : (1) that the suit was not maintainable ; (2) that the amendment should not have been allowed and (3) the grant was a personal grant to the appellants burdened with the provision for service and it was not a specific endowment. As far as the first question is concerned it has not been shown as to how the suit was not maintainable. The question of amendment, in our opinion, was rightly decided by the High Court. As held by that Court all the necessary allegations had been made in the plaint and the requisite pleas had been raised by the appellants ; an issue was framed on the question and the parties were fully cognizant of the points in controversy and the necessary evidence was led by the parties. In this view of the matter the High Court was right in allowing the amendment by the addition of a prayer in the prayer clause.

We then come to the question of the nature of grant which on a consideration of the documentary evidence and other evidence has been found by both the Courts below to be a specific endowment for *Kalyanotsavam*. This finding was challenged by the appellant. For that purpose it is necessary to consider the inam papers which form the main and basic documentary evidence of the appellant. Inam Registers have always been treated as evidence of the utmost importance. The first document to be considered is of the year 1859-60 which is a copy of the inam statement made by N. Buchayya, the ancestor of the present appellants. Column 1 of this document shows the names of the inamdars and the enjoyers to be "N. Buchayya the present enjoyment is towards the *Kalyanotsavam*" of the deity. Columns 4 and 5 give the residence and name of the original inamdars. In Column 5 are given the particulars of the family of the then enjoyers and the entry is for the deity's *Kalyanotsavam*. In Column 6 is given the name of the grantor who gave the land to the grantee and "with the income therefrom he has been performing Sri Swami Varu's *Kalyanotsavam* from that time". Columns 7-9 give the extent of the land. In Column 11 particulars relating to the present enjoyment are to be given and the entry was Sri Swami Varu's *Kalyanotsavam*. In Column 12 it was shown that the grant was revenue-free and the land was under the cultivation of Buchayy

the income of which was Rs. 11 per annum. The entries show that the inam was granted as a specific endowment for the *Kalyanotsavam* of the deity and the amount was spent in the services of the deity.

The next document to be considered is a copy of the inam fair register of May 16, 1860. The High Court finding that some of the entries in that document were not clear sent for the original Register from the Collector's Office and it was found that some of the entries were not in the original at all. In Column 8 the words ' driving the car ' were not to be found and the remarks in Column 12 to the effect that 'the purpose for which the *inam* was granted is not stated ' were not in the original register. In Column 2 of this document the general class to which the *inam* belonged is shown as religious endowment. Column 8 relates to the description of the *inam* and the entry is ' For service in the pagoda.........The service is performed '. Columns 9-11 relate to tenure. Column 12 has already been discussed. In Column 9 it is shown as free of tax. In Column 13 the name of the original grantee is shown to be the ancestor of the appellants. In Column 15 the entry is ' In fasli 1223 Viresalingam 0-8-8—In fasli 1236 Nanduri Vissanna Buchayya for service during the festival of the pagoda 0-8-0.' In Column 21 the entry contains the following: 'to be confirmed and continued so long as the service is performed. In fasli 1216 the inamadar is entered as village servant but it is ascertained and is entered in fasli 1256 (?) that service is performed from a long time in the pagoda'. In Column 22 it is stated ' confirmed ' and below that is given the number of the title deed to be T. D. 243. From these documents and from the fact that neither the sanad nor the *inam* title deed was produced and taking into consideration some admissions of the predecessors of the appellants where it was admitted that they were *dharmakartas* of the *Kalyanotsavam* and had been performing that service the High Court came to the conclusion that the *inam* lands in dispute were endowed for *Kalyanotsavam* and other purposes incidental thereto and constituted a specific trust and the appellants were trustees thereof.

It was urged by counsel for the appellants that the words in the Inam Register that the grant was to continue as long as the service is performed were indicative of the fact that the grant was not to the deity but to them individually with the added obligation of spending from out of the income on the particular service to the deity. A combined reading of the two documents, *i.e.*, statement of the ancestor of the appellants and the Inam Register shows that the grant was a specific endowment and that the lands, were endowed for the purpose of *Kalyanotsavam* and for other purposes incidental thereto and constituted a specific trust. The Courts below have found this to be the nature of the trust and even if two inferences were possible from the reading of these two documents there is no reason why the view taken by the Courts below should be interfered with particularly when there are admissions by the predecessors of the appellants which support the view of the Courts below. Besides those words do not necessarily mean that the grant was to the individual with the added obligation to spend on the performance of service. In the present case it is not stated in the Inam Fair Register that the grant was to be confirmed in favour of Buchayya and continue so long as the service was performed. This kind of language used in Inam Registers has been discussed in some decided cases in the Madras High Court, *e.g.*, *Hindu Religious Endowments, Madras* v. *Thadikonda Koteswara Rao*[1], where this distinction was prominently brought out between the words "to be confirmed so long as the service is performed " and to be confirmed to the party so long as he continues the performance of the services ". The latter was held to be a personal grant and the former was not so held. We are therefore of the opinion that the finding of the High Court that the grant was a specific endowment for *Kalyanotsavam* of the deity and therefore a specific trust and not a grant to the appellant with the added obligation of spending on the service must be accepted to be correct.

1. (1937) 2 M.L.J. 413 : A.I.R. 1937 Mad. 852.

The next question for decision is as to what portion of the income of the inam lands is to be expended on the service to the deity. The Courts below are not in accord on this point. The trial Court held that Rs. 200 out of the income should be adequate for the purpose and the High Court applied *Cy-pres* doctrine and held the whole income to be for the deity even though it exceeded the expenditure for the particular service. One of the facts which emerges from the Inam Register is that when the grant was made the specific charitable payments exhausted the income of the property and it is a fair inference to draw therefrom that the intention was to devote the whole income to charity and any, subsequent increase in the value of the property accrues to the charity; *Hindu Religious Endowments, Madras* v. *Thadikonda Koteswararao*[1], Tudor on Charities, 5 Ed., p. 164; Laws of England, Vol. 4 (para.) 624, p. 303. The High Court was therefore justified in holding that the whole of the income was to go to deity, thus varying the judgment of the trial Court that only a portion of it was to be so employed. The High Court applied *Cy-pres* doctrine relying on *N. Sankaranarayana Pillayan and others* v. *The Board of Commissioners for H. R. E., Madras*[2]. It was there held that where the grant is to the deity and the income is earmarked for the services for which the specific endowment is created, if there is a surplus which cannot be spent on these services, it would be a case for the application of the *Cy-pres* doctrine. Taking into consideration that originally the inam income was only Rs. 11 the whole of which was to be and was expended on the service of the deity, *i.e.*, *Kalyanotsavam* and considering the nature of the grant the High Court has rightly applied *Cy-pres* doctrine.

We are therefore of the opinion that the Judgment of the High Court was right and we dismiss this appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR, AND M. HIDAYATULLAH, JJ.

R. Muthammal (Died) and another .. *Appellants**

v.

Sri Subramaniaswami Devasthanam, Tiruchendur and others .. *Respondents.*

Hindu Law—Inheritance—Lunacy—If should be congenital to disentitle an heir to succeed.

Under the Hindu Law, lunacy was not required to be congenital to disentitle a person to succeed to his father (who died on 10th December, 1927 in the present case). It may be noted that when the Legislature passed the Hindu Inheritance (Removal of Disabilities) Act (XII of 1928) making the change to madness from birth as a ground of exclusion, the law was not made retrospective, thus recognising the correctness of the judicial exposition of the original texts.

Appeal from the Judgment and Decree, dated the 20th January, 1947, of the Madras High Court in A.S. No. 392 of 1943, arising out of the Judgment and Decree dated the 30th March, 1943, of the Sub-Judge, Tuticorin in O.S. No. 34 of 1939.

S. V. Venugopalachariar and *M. S. K. Aiyangar*, Advocates, for Appellant No 2.

A. V. Viswanatha Sastri, Senior Advocate (*R. Ganapathy Iyer*, Advocate and *G. Gopalakrishnan*, Advocate of *M/s. Gagrat & Co.*, with him) for Respondent No. 1.

The Judgment of the Court was delivered by

Hidayatullah, J.—This appeal has been filed on leave granted by the High Court of Madras against its judgment and decree, dated January 20, 1947, by which the decree of the Subordinate Judge, Tuticorin, dated March 30, 1943, was substantially modified.

Before the application for leave to appeal to the Judicial Committee could be filed, the first defendant (Ramasami Pillai) died, and the application for leave was

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1. (1937) 2 M.L.J. 413 : A.I.R. 1937 Mad. 852.

2. (1947) 2 M.L.J. 315 : L.R. 74 I.A. 230 (P.C.).

* Civil Appeal No. 200 of 1955. 14th January, 1960.

filed by his widow, R. Muthammal, who was the fourth defendant in the suit. R. Muthammal also died soon afterwards, and her place was taken by Parameswari Thayammal (her daughter born of Ramasami Pillai), who was the fifth defendant in this case. Along with these three defendants, the other members of Ramasami Pillai's family were also joined as defendants. The suit was filed by Sri Subramaniaswami Devasthanam, Tiruchendur (hereinafter called for brevity, the Devasthanam,) and the Devasthanam is the only contesting respondent in this Court.

One Poosa Pichai Pillai had five sons and three daughters, of whom Meenakshisundaram Pillai died on May 21, 1919. Before his death, Meenakshisundaram Pillai executed a registered will on May 20, 1919, and a registered codicil on May 21, 1919. By these documents, he left his entire property to his only son, M. Picha Pillai, with the condition that should he die without issue, the property was to go to the Devasthanam.

M. Picha Pillai died a bachelor on December 10, 1927. Three claimants claimed the property after his death. The first naturally was the Devasthanam claiming under the gift over to it. The other two were the heirs of M. Picha Pillai, who asserted that the gift over was void, and Meenakshisundaram's wife's brother and sister, Arunachala Irungol Pillai and N. S. Muthammal (third defendant), respectively, who claimed under an alleged will of M. Picha Pillai. The heirs of M. Picha Pillai were defendants 7, 8, 10, 13 and 14, the father of defendant 9, and the first defendant. These claimants denied the claim of the Devasthanam and contended that the will and the codicil above-mentioned gave an absolute estate to M. Picha Pillai, and that the gift-over to the Devasthanam was, therefore, void. The Devasthanam filed O.S. No. 57 of 1932 for declaration and possession of the properties covered by the will, together with other reliefs. During the pendency of the suit, the heirs of M. Picha Pillai and the present defendants 15 and 16 (two of the three sons of Arunachala Irungol Pillai) assigned their interest in favour of the Devasthanam. The result of the suit, therefore, was that a decree in favour of the Devasthanam was passed in regard to the interest of the assignors, but it was dismissed as regards the interest of N. S. Muthammal (third defendant) and Pothiadia Irungol Pillai (second defendant) who had not entered into the compromise. It may be mentioned here that by Exhibit D-22, a registered agreement, dated May 20, 1928, the heirs had already agreed to give to Arunachala Irungol Pillai and N. S. Muthammal one-eighth share each respectively in the properties of M. Picha Pillai. Thus, by this compromise the Devasthanam received 5/6th share of the properties of M. Picha Pillai, the remaining 1/6th, going to Pothiadia Irungol Pillai (1/24th) and N. S. Muthammal (1/8th). The Devasthanam filed an appeal in the High Court against the dismissal of the suit in respect of this 1/6th share and failed. An appeal was then taken to the Judicial Committee, which also failed. The judgment of the Privy Council is reported in *Sri Subramaniaswami Temple* v. *Ramaswamia Pillai*[1].

Without waiting, however, for the result of the appeal in so far as the 1/6th share was concerned, the Devasthanam filed the present suit joining the two sets of claimants for declaration, ejectment and possession by partition of the properties to which it claimed title and for mense profits. The properties were shown in various schedules annexed to the plaint; but it is unnecessary to refer to those schedules except where the needs of the judgment so require. One of the contentions raised by the plaintiff-Devasthanam in this suit was that the first defendant, Ramaswami Pillai, was not entitled to a share in the properties as an heir of M. Picha Pillai, being a lunatic when succession to these properties opened. On behalf of the first defendant, Ramasami Pillai, who contested the suit through his wife and guardian, R. Muthammal, it was contended that he was not a lunatic (*buddhi swadeenam illadavar*) but only a person of weak intellect (*buddhi deechanya matra*) and thus, he was not excluded from inheritance. This point was the main argument in this appeal, because the two Courts below reached opposite conclusions. According

1. (1950) 1 M.L.J. 300 (P.C.).

to the Subordinate Judge of Tuticorin, Ramasami Pillai's plea was correct and proved. The High Court, on the other hand, held that the mental defect in Ramaswami Pillai amounted to lunacy, and that it disentitled him to a share.

Connected with this above matter is the second contention raised by Ramasami Pillai that he was entitled to a 1/9 share by virtue of an alleged agreement stated on affidavit in Exhibit D-7 by Doraiappa Pillai on April 1, 1931. We shall give the details of this contention hereafter. The third contention raised in this appeal and also before the High Court was that the properties described in plaint schedule 4-A were the subject-matter of a decree, dated September 19, 1927, in favour of M. Picha Pillai in O.S. No. 35 of 1924 filed by him against his cousins. According to Ramasami Pillai (first defendant) the decree was not executed for a period of 12 years and the claim thereto was, therefore, barred under section 48 of the Code of Civil Procedure, and thus the Devasthanam was not entitled in this suit to claim possession of those properties.

We shall begin with the question whether Ramasami Pillai was excluded from inheritance by reason of his mental condition on December 10, 1927. The argument of the appellant is two-fold. The first is on the fact whether Ramasami Pillai was a lunatic within the Hindu law texts. The second is a question of law whether this lunacy was not required to be proved to have been congenital to disentitle Ramasami Pillai to succeed to his father. We shall deal with these two questions separately.

In view of the fact that the two Courts below had reached opposite conclusions on the fact of lunacy, we have looked into the evidence in the case, and have heard arguments for the appellant. We are satisfied that the opinion of the High Court is correct in all the circumstances of this case. The argument on behalf of the appellant was that in judging this issue we should see the evidence regarding the mental condition of Ramasami Pillai antecedent and subsequent to December 10, 1927, and the conduct of his father, relatives and the other claimants of the property. It was contended that Ramasami Pillai was attending school, though nothing was shown to us from which we could infer that he had profited by the attempts to educate him. The appellant, however, set great store by two documents, Exhibits D-1 and D-2, executed by his father, Perumal Pillai, in January and April, 1924. By the first, Prumal Pillai released his claim to certain properties in favour of his four sons, mentioning therein Ramasami Pillai without adverting to the fact that he was a lunatic and without mentioning a guardian. By the second, which was a will, Perumal Pillai gave equal shares in his properties to his sons including Ramasami Pillai, and once again without a mention of his mental condition. It was contended that Perumal Pillai was a Sub-Registrar who would know the importance of such a fact and also the law that a lunatic was not entitled to succeed. The fact that the father in these two documents made no mention of the mental condition of his son does not bear upon the present case for two reasons. The first is that the case of Ramasami Pillai in this suit was that he was quite sane till 1924 and that his mental condition deteriorated only after that year. The second is that the omission by the father to mention this fact might be grounded on love and affection in which the claim of a mentally defective child might not have been viewed by him in the same manner as the law does.

It was next contended that the other heirs recognised the right of Ramasami Pillai in April, 1928 and agreed to give him a 1/9th share, as has been already stated above. That, too, would not prove that Ramasami Pillai was entitled, in law, to a share. The compromise (which is also contested) might have been out of motives of charity but might not have been due to the fact that Ramasami Pillai's right to a share was legally entertainable.

The evidence, however, of Ramasami Pillai's mental incapacity is really voluminous. Between June, 1924 and till his death, numerous suits were filed by different members of the family, including his wife, his cousins, uncle and aunt, in which Ramasami Pillai was always shown as a lunatic requiring the appointment of a next friend or a guardian, *ad litem*. In one case only where Ramasami Pillai was the second defendant, an appearance was entered on his behalf by a vakil, who contend-

ed that Ramasami Pillai was sane and ought to be represented in person. The Court on that occasion, appointed the Head Clerk of the Court as his guardian, and asked him to report about the condition of Ramasami Pillai. Ramasami Pillai was also asked to appear in Court in person, so that the Court might form its own opinion by questioning him. The Head Clerk visited Ramasami Pillai and submitted his report, Exhibit P-8, in which he described his observations. It appears that Ramasami Pillai did not even give his name when questioned, and appeared to be moody and silent. The relatives felt that he was hungry and fed him ; but even after this, Ramasami Pillai did not give any answers to the questions put to him in the presence of his wife and others. The Head Clerk, therefore, reported that the appearance of Ramasami Pillai as a gloomy and sickly person with a vacant look and that his inability to answer even simple question about his name, clearly showed that he was insane. This report was presented to the Court in the presence of the vakil, who had filed the vakalatnama, and on September 20, 1924, an order (O.S. No. 35 of 1924) was recorded by the Subordinate Judge (Exhibit P-9). It was mentioned therein that the report was not objected to by the vakil for Ramasami Pillai, and that Ramasami Pillai was treated as a lunatic. Ramasami Pillai himself did not appear.

It was contended that this enquiry as well as the fact that in numerous litigations Ramasami Pillai had a guardian or next friend to look after his interests did not prove that he was insane within the meaning of the Hindu law texts ; it only proved that he was a person incapable of looking after his interests and for the purposes of the conduct of the suits a guardian or next friend, as the case might be, was necessary. In our opinion, the long and continued course of conduct on the part of the various relatives clearly shows that Ramasami Pillai was, in fact, a lunatic, and the report of the Head Clerk given in a case long before the present one was ever contemplated, shows only too clearly that he was, for all intents and purposes, not only a person who was slightly mentally deranged but one who was regarded and found to be a lunatic. There being this evidence, the distinction now sought to be made and which appealed to the Subordinate Judge of Tuticorin, is not borne out by the evidence in the case. Such a long and continuous course of conduct clearly proves the contention that Ramasami Pillai, was, in fact, mad. Further, in Exhibit D-22, dated May 20, 1928, Ramasami Pillai was not considered as a claimant, and his claims could not have been overlooked by all his relatives simply because they were to get an additional 1/72nd share each in the property by reason of his exclusion. Some one of his relatives would have felt the need for asserting the claim on his behalf, if he himself did not do so. In view of the fact that the preponderance of probabilities is in favour of the decision of the High Court, we do not think that the appellant has succeeded in establishing the distinction, which was made in the case, between a lunatic and a person of weak intellect on the evidence, such as it is.

This brings us to the next contention which is one of law. It may be pointed out here that before the Subordinate Judge, Ramasami Pillai did not raise the contention that as a matter of law insanity must be congenital before a person would be excluded from inheritance. Learned counsel for the appellant explained that it was futile to raise this contention in view of the decision of the Madras High Court in *Muthusami* v. *Meenammal*[1], in which it was ruled that insanity need not be congenital to create the disability, and that insanity at the time succession opened was enough. The point, however, appears to have been raised in the High Court, but it was decided against Ramasami Pillai. The soundness of this view is questioned in this appeal.

The argument shortly is this : The text of Manu (ix, 201) mentions many causes of exclusion from inheritance, some of which like blindness, muteness, idiocy and lameness, it is settled, must be congenital to exclude a person from inheritance, It is argued that the collocation of the words in the text suggests that insanity like these other disabilities must also be congenital. No doubt, the word "*unmatha*"

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1. (1920) I.L.R. 43 Mad. 464 : 38 M.L.J. 291.

comes between the words "*jatyandhabadhirau*" and "*jadamukascha*" but the rulings have uniformly held that for madness, the test, that it should be congenital, does not apply. The argument now raised has the support of the opinion expressed by Dr. Sarvadhikari in his Principles of Hindu Law of Inheritance (2nd Edn.), p. 846, where the author expounded the text according to rules of grammar, though he was doubtful if according to medical science, madness as opposed to idiocy is ever congenital. The translations of the same text by Setlur, Gharpure and Dr. Ghose do not admit this interpretation. In *Muthusami* v. *Meenammal*[1], it was pointed out also that "*unmatha*" was not qualified by the word "*jati*". Seshagiri Ayyar, J., observed that

"according to Mimamsa rules of interpretation, and adjective qualifying one clause should not by implication qualify a different clause."

The counsel on that occasion agreed that this was the correct approach, but relied upon the opinion of Dr. Sarvadhikari which was not accepted.

Learned counsel for the appellant also referred to the opinion of Colebrooke in his Digest, Vol. II, p. 432. Colebrooke's translation is based upon the commentary of Jagannatha Tarkapanchanana, and it is Jagannatha who made no difference between the various disabilities, and opined that madness like blindness or muteness must be also congenital. No doubt, much weight must be attached to the opinion of Jagannatha who was "one of the much learned pandits that Bengal had ever produced". But this translation of Colebrooke has not been universally accepted, and is not borne out by the original texts and commentaries on the Mitakshara. Dr. Ghose in his Hindu Law, Vol. I, p. 224, has expressed his doubts. The texts of Narada XIII, 21, 22, Yajnavalkya II, 140-141 and others do not show that the defect of madness must also be congenital. In Saraswati Vilasa 148, the emphasis of congential disability is placed on blindness and deafness. Similarly, in Smriti Chandrika, Chap. V, 4, persons born blind and deaf are mentioned apart from madmen and idiots. That idiots must be congenitally so, is ruled by the Courts.

The cases that have come before the Courts have all been uniform, except *Murarji Gokuldas* v. *Parvatibai*[2], where the observation is *obiter* and *Sanku* v. *Puttamma*[3], which was dissented from in later cases. On the other hand, *Wooma Pershad Roy* v. *Grish Chunder Prochundo*[4], *Deo Kishen* v. *Budh Prakash*[5], and other decisions have clearly held the contrary. In two cases before the Privy Council it was assumed that madness need not be congenital. It may also be noted that when the Legislature passed the Hindu Inheritance (Removal of Disabilities) Act XII of 1928 making the change to madness from birth as a ground of exclusion, the law was not made retrospective, thus recognising the correctness of the judicial exposition of the original texts. In this view of the matter, we do not think that we should unsettle the law on the subject; nor has it been made to appear to us that any different view is open. We accordingly do not accept the contention.

The result is that Ramasami Pillai was not entitled to succeed to M. Picha Pillai. We now come to the next contention. It is that even if this be the position, Ramasami Pillai was entitled to 1/9th share on the basis of an alleged arrangement evidenced by Exhibit D-7, dated April 1, 1931. This document is an affidavit which was filed by Doriappa Pillai (Defendant 8) in a suit (O.S. No. 25 of 1930) filed by him for possession after partition of his 1/8th share on the basis of Exhibit D-22. In that suit, Ramasami Pillai was the second defendant. Exhibit P-5 is the written statement filed on his behalf in which he repudiated that he was excluded from inheritance by reason of his insanity. This suit was withdrawn on April 2, 1931, with the leave of the Court, with liberty to bring a fresh suit (Exhibit D-6). In the affidavit which was filed, it was stated as follows :

"5. Excepting Defendant 9, myself and almost all the Defendants agree to give to Defendant 2 an equal share with others and thus come to some amicable arrangement between us.

1. (1920) 38 M.L J. 291 : I.L.R. 43 Mad. 464.
2. (1876) I.L.R. 1 Bom. 177.
3. (1891) I.L.R. 14 Mad. 289.
4. (1884) I.L.R. 10 Cal. 639.
5. (1883) I.L.R. 5 All. 509 (F.B.).

6. In view of the ninth Defendant's contentions in the suit and in view of the fact that I have not prayed in this suit for a declaration of my title to the properties as against him, I am advised that I should withdraw the present suit for partition with liberty to institute a fresh suit as I may be advised.

7. It is therefore just and necessary that I may be permitted to withdraw this suit with liberty to bring a fresh suit properly framed."

The Subordinate Judge held on this and the evidence of D.W. 2 that this family arrangement was duly proved, and that Defendant 10 who was present in Court when the above statement was made, did not choose to deny it.

The High Court rightly pointed out that the affidavit did not show the compromise as a completed fact, and also did not accept the word of D.W. 2. The claimants, who are stated to have given a share to Ramasami Pillai, have not been examined. The High Court also noticed that no application for transfer of the pattas was made. In view of these circumstances which are all correct, the appellant cannot be said to have successfully established the family arrangement, and we do not consider it necesssary to examine the oral evidence in the case.

This brings us to the last point that Ramasami Pillai was entitled to a share in the properties comprised in Schedule 4-A. M. Picha Pillai had filed O.S. No. 35 of 1924 against his cousins for possession of these properties. The suit was decreed on September 19, 1927. On October 30, 1927, P. Picha Pillai (Defendant 7) and Serindia Pillai sent a notice, Exhibit P-3, informing M. Picha Pillai that he could take possession of the properties covered by the decree. This notice was refused and returned to the senders. M. Picha Pillai died soon afterwards on December 10, 1927. It is contended that the properties thus remained in possession of the judgment-debtors, and the decree not having been executed, the present suit filed on October 18, 1939, is barred in so far as those properties are concerned, and the Devasthanam cannot get possession of them.

Both the Courts below have concurred in holding that M. Picha Pillai must have got possession otherwise than by execution of the decree, because even D.W. 2 not very friendly to the Devasthanam admitted that M. Picha Pillai was at the time of his death in possession of all the suit properties. The two Courts below also adverted to the fact that for the years, Faslis 1338 and 1339 the 10th defendant paid the taxes, and this would not happen if the heirs of M. Picha Pillai were not in enjoyment. The fact that the patta stood in the names of the original judgment-debtors would not indicate anything, because mutations sometimes lag behind change of possession. In view of the fact that the two Courts below have agreed on the finding and there is evidence to support it, we see no reason to interfere.

The question of mesne profits was not pressed, and no other point having been argued, we hold that the appeal has no merits. It will, accordingly, be dismissed with costs.

Appeal dismissed

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Dr. B. K. Pal Chaudhry ... *Appellant**

v.

The State of Assam ... *Respondent.*

Criminal Procedure Code (V of 1898), section 479-A (1) and (5)—Scope and effect—Requirements of section.

The combined effect of sub-sections (1) and (5) of section 479-A of the Code of Criminal Procedure is to require the Court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interest of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a complaint should be made or not.

*Crl. Appeal No. 81 of 1959. 7th October, 1959.

The finding required by section 479-A (1) is only of a *prima facie* nature; it cannot be a finding which would have any force at the trial upon the complaint made pursuant to that finding. The notion of avoiding prejudice at the trial upon the complaint would not justify a clear breach of the terms of the section requiring a *prima facie* finding.

Appeal by Special Leave from the Judgment and Order, dated the 19th March, 1959, of the Assam High Court in Criminal Misc. Case No. 2 of 1958.

H. J. Umrigar and *D. N. Mukherjee*, Advocates, for Appellant.

Naunit Lal, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant is a medical doctor and at the material time, he was the Civil Surgeon of Dibrugarh. He was a witness in a criminal case being G. P. Case No. 654 of 1954 in which three persons were charged *inter alia* under section 376 of the Indian Penal Code with the offence of rape. The case was tried with the aid of a jury and resulted in a verdict of acquittal in respect of that charge. There was an appeal to the High Court of Assam against the acquittal which was allowed and two of the accused persons were convicted.

The offence was said to have been committed on a minor girl named Roheswari Chetia sometime in the afternoon of March 19, 1954. The same day at 6 P.M. she was examined by Dr. Dhanbir Pait, the doctor in charge of Moran Dispensary, near which the offence was alleged to have been committed. It appears that the police produced her for another medical examination at the District town of Dibrugarh the next day and she was then examined by Dr. Mahibulla who was an assistant to the appellant, the Civil Surgeon. Thereafter, the police on March 21, 1954, produced the girl before the appellant for a further medical examination and she was examined by him on that date. With the reasons for these repeated medical examinations we are not concerned in this case.

Doctor Pait was called as prosecution witness at the hearing of the case while the appellant and Dr. Mahibulla were called by the accused as defence witnesses. Dr. Pait in his evidence was clear that the girl had been raped. He said that he found two circular teeth marks on her cheeks and a reddish circular mark on her left breast. He also said that he found the hymen ruptured and gave other details in support of his opinion that the girl had been ravished. In his opinion, the hymen appeared to have been ruptured the same day that he examined the girl. Dr Mahibulla's evidence was that the hymen was ruptured but the rupture had taken place nine or ten days before the incident and was not a recent one. The appellant in his evidence stated that the marks on the cheeks of the girl appeared to be insect-bite and that the hymen was not ruptured. He found no evidence of rape on her person. There was thus direct contradiction between the evidence of the doctor called by the prosecution and the doctors called by the defence, on the question of the rupture of the hymen.

As we have earlier stated, the High Court allowed the appeal against acquittal in the view that the commission of the offence of rape had been established by the evidence of the doctor called by the prosecution and other evidence led by it. It is not necessary to refer for the purposes of this appeal to the other evidence produced. The appeal to the High Court was heard by Sarjoo Prosad, C.J., and Deka, J. After allowing the appeal and convicting the two accused, these learned Judges on the same day, passed an order in the terms set out below, directing the issue of a notice to the appellant.

"*31st July*, 1958. Issue notice on Dr. B.K. Pal Chaudhury (D.W. 2), Retired Civil Surgeon, Dibrugarh, to show cause why he should not be prosecuted under section 193, Indian Penal Code for giving false evidence in connection with G.P. Case No. 654 of 1954 (Lakhimpur Case No. 72 o 1955)—*The State* v. *Mahendra Nath Barua and others*."

The notice was, thereafter, duly issued and served on the appellant. Purusant to the notice the appellant showed cause, but this time the matter was heard by Deka and Mehrotra, JJ. These learned Judges came to the conclusion that it was a fit case in which a complaint should be made against the appellant for an offence punishable under section 193 of the Indian Penal Code and directed the Registrar of the High Court to lodge the complaint in the Court of the Deputy Commissioner, Lakhimpur.

It is against this order directing the making of the complaint, that the present appeal was filed.

Sections 476 to 479-A of the Code of Criminal Procedure deal with complaints to be made for the offence of giving false evidence as defined by section 193 of the Indian Penal Code and for other offences mentioned therein. Section 479-A was introduced into the Code of Criminal Procedure by the Code of Criminal Procedure (Amendment) Act, 1955. Sub-section (6) of this section is in these terms :

"*Section 479-A* (6)—No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section."

Now, the present case was one in which the proceedings were directed to be taken for giving false evidence and the learned Advocates, appearing for the parties to this appeal, agreed that sub-section (6) of section 479-A makes sections 476 to 479 inapplicable to it. In that view of the matter, we think it unnecessary to consider these sections.

Section 479-A (1) so far as it is material to the present case, is in these terms:

"When any. . . . . . Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceedings. . . . . . and that, for the eradication of the evils of perjury. . . . . . and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reason therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof."

Sub-section (5) of this section runs as follows :

"In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under sub-section (1), the power conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the Appellate Court ; and where the Appellate Court makes such complaint, the provisions of sub-section (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard."

The appellant's contention is that the terms of this section were not complied with. We think that this contention is justified. The present case is governed by sub-section (5) of section 479-A for here the complaint was not made by the trial Court but by the Appellate Court. Therefore the terms of both sub-sections (1) and (5) have to be complied with. The combined effect of these sub-sections is to require the Court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a complaint should be made or not.

It seems to us that none of these conditions of the section was observed by the High Court when it directed the complaint to be made. First, there was no finding recorded by it that the appellant had intentionally given any false evidence or that it was expedient to proceed against him for the eradication of the evils of perjury and in the interests of justice. The order which directed the notice to issue—and that seems to be the only order in connection with the matter—does not record any such finding. Nor do we find in the judgment in the main appeal heard by the High Court in the case in which the appellant gave evidence, any such finding.

Secondly it does not seem to us that the High Court gave the appellant a proper hearing to which he was clearly entitled under the terms of sub-section (5) of section 479-A. Deka, J., in the judgment that he delivered directing the complaint to be made, contented himself by saying that the procedure laid down by section 479-A of the Criminal Procedure Code had been substantially followed except that in order to avoid prejudice to the appellant at the trial to follow the complaint, the reasons for supposing the witness to have perjured had not been elaborately or specifically dealt with. It does not seem to us that this is a satisfactory way of dealing with the question raised.

What Mehrotra, J., said, however, is, in our view, clearly erroneous. It appears to have been contended by the learned Advocate for the appellant in the High Court

that because the High Court had preferred to accept the testimony of the other doctors, it could not necessarily be said that the evidence of the appellant was false or that he intentionally gave false evidence and it was open to the Court on hearing the appellant to come to a different conclusion on these matters. Mehrotra, J., dealing with these contentions said

> "That these are matters which may be taken into consideration by the Court trying the case but cannot be considered by this Court at this stage. Any observation by this Court on merits is likely to prejudice the trial of the case."

He observed that section 479-A was inserted with the object of avoiding further inquiry which inquiry was required by section 476. There are two further observations made by this learned Judge which are of great materiality in the present appeal and we set them out below:

> "The witness is in effect challenging the correctness of the findings of the Bench hearing an appeal that he intentionally made a false evidence. It is not open to this Bench to upset this finding".

> "To my mind it is not open to the other Bench to record a finding different from the Bench hearing the appeal on the question of the witness intentionally giving a false evidence."

It is obvious from these observations of Mehrotra, J., that he considered himself bound by the findings of the Bench hearing the appeal that the appellant had intentionally given false evidence. We have earlier stated that the Bench hearing the appeal expressed no such finding. However that may be, it seems clear to us that the statute by providing in sub-section (5) of section 479-A, which is the provision governing this case, that no order directing a complaint shall be lodged without giving the person affected thereby an opportunity of being heard, intended that after giving that hearing it would be open to the Court to decide not to make a complaint. Otherwise there would be no sense in directing that a hearing should be given. Now the Court may, after giving that hearing, decide not to make a complaint either for the reason that the Court was satisfied that no false evidence was given by the witness concerned or that such evidence was not intentionally false, or lastly, that it was not expedient in the interests of justice or to eradicate the evils of perjury, to make the complaint. By stating that it was not open to him "to upset" the finding of the Bench hearing the appeal that false evidence had been intentionally given, Mehrotra, J., really did not give any hearing to the appellant as the sub-section required him to do. He thought that the course adopted by him would be in the best interests of the appellant as it would prevent his case from being prejudiced at the trial upon the complaint. We consider that the ground of prejudice is more fancied than real. The finding required to be made by section 479-A (1) is only of a *prima facie* nature; it cannot be a finding which would have any force at the trial upon the complaint made pursuant to that finding. Further, this notion of avoiding prejudice would not justify a clear breach of the terms of the section.

The order of the High Court cannot be supported even if it is assumed that Deka, J., took a correct view of the matter, for, the other learned Judge clearly took a wrong view and it cannot be said what the decision would have been if he had approached the matter from the correct point of view. We are therefore satisfied that the order appealed against had been made in breach of the express provisions of sub-sections (1) and (5) of section 479-A, and cannot be allowed to stand.

It was suggested by the learned Advocate for the respondent, the State of Assam, that we might go into the evidence and make a complaint ourselves. We do not consider it fit to take this course even if it be open to us, as to which we say nothing, for we find it impossible to do so without going into the entire case and all the evidence led, and these are not before us.

It was then said that we should remand the case back to the High Court for giving proper hearing to the appellant, but we do not think that we should make that order either. All that has happened is that the High Court has made the order in breach of the section and what we are called upon to do is to set aside that order. What further action can be taken in accordance with law is for the High Court to decide.

The result, therefore, is that this order of the High Court is set aside and the appeal is consequently allowed.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—N. H. BHAGWATI, B. P. SINHA AND J. L. KAPUR, JJ.

The Commissioner of Income-tax, Hyderabad .. *Appellant**

v.

Vazir Sultan and Sons .. *Respondents.*

Income-tax Act (XI of 1922)—Income—Receipt of compensation for loss of agency business—Capital or revenue receipt—Test—Liability to tax.

The High Court of Hyderabad on a reference under section 66 of the Income-tax Act (XI of 1922) answered the question of law 'whether the receipt of Rs. 2,19,343 (O.S.) (by way of compensation for the loss of agency business by restricting it to Hyderbad State) by the respondent assessee company is liable to be taxed under the Act,' in favour of the assessee. The Revenue appealed therefrom to the Supreme Court.

Held (by Majority, *Kapur, J.*, dissenting).—The definition of income in the *Shaw Wallace Case* (1932) L.R. 59 I.A. 206 : 63 M.L.J. 124 (P.C.) as periodical return coming or expected to come with some sort of regularity from definite sources (excluding one in the nature of windfall) was not approved in *Kamakshya Narain's case*, (1943) L.R. 70 I.A. 180 : (1943) 2 M. L. J. 410, and in *Raghuvamshi Mills' Case*, (1953) S.C.R. 177 : (1952) S.C.J. 660 : (1953) 1 M.L.J. 113, it was held that the definition has to be read with reference to the particular facts of that case. That definition may have to be revised. But in the present case the head of income under which the respondent was assessed is 'business' and therefore whether the income is of a recurring or non-recurring nature does not enter into the picture.

The question for consideration is whether agreement of agency in question for the cancellation of which the payment was received by the assessee was a capital asset of his business, constituted its profit-making appartus and was in the nature of its fixed capital or was a trading asset or a circulating capital or stock-in-trade of his business. If the former, the payment received would undoubtedly be a capital receipt; if, however, the same was entered into by the assessee in the ordinary course of business and for the purpose of carrying on that business it would fall into the latter category and the compensation or payment received for its cancellation would constitute a trading or a revenue receipt and not a capital receipt.

Whether there was an enforceable agreement as between the assessee and his principal supporting a legal claim for compensation or damages is not decisive. One has really got to look to the nature of the receipt in the hands of the assessee irrespective of such a consideration.

It is also immaterial whether the asset (agency) was of an enduring character or terminable at will.

In the instant case, the agreements of agency, in fact, formed the fixed capital assets of the (respondent) assessee's business, worked and exploited by it by entering into contracts for the sale of 'Charminar' cigarettes to the various customers and dealers in the respective territories. The agreements did not constitute the business of the assessee but was the means by which the assessee entered into the business transactions by way of distribution of the cigarettes ; they really formed the profit-making apparatus of the said business of distribution. Hence any payment received as compensation for terminating or cancelling them would only be a capital receipt and not a revenue receipt ;

It would not make any difference for this purpose if either one or both of the agreements were terminated or cancelled. The position would be the same in any event.

Per *Kapur, J.*—The agency in question was one terminable at will and any compensation for it would *prima facie* be a revenue receipt.

Compensation for the loss of an agency would be for the loss of a capital asset if the termination of an agency was a damage to the recipients' business structure, such as to destroy or materially cripple the whole structure involving serious dislocation of the commercial organisation ; but if it was merely compensation for the loss of trading profit (*i.e.*) in respect of commissions that would have been earned if the agency continued that it is revenue.

In the instant case, the agreement of agency surrendered was terminable at will ; the amount of profits made by the assessee working the agency contract in Hyderabad State was much more than the amount he received for the termination of their agency outside that State, showing that the termination did not affect the trading activities. Therefore the termination of the contract viewed against the background of the assessees' business organisation and profit-making structure the compensation paid appears to be no more than compensation for the loss of future profits and commission ; the compensation therefore was in the nature of surrogation and in this view it is a revenue receipt and not capital and the appeal is to be allowed.

Appeal from the Judgment and Order, dated the 29th November, 1954, of the Hyderabad High Court in Reference No. 234/5 of 1953-54.

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* Civil Appeal No. 340 of 1957. 20th March, 1959.

K. N. Rajagopala Sastri, R. H. Dhebar and *D. Gupta*, Advocates, for the Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*P. Rama Reddy* and *R. Mahalinga Iyer* Advocates, with him) for Respondents.

The Court delivered the following Judgments.

Bhagwati, J. (for Majority)—This appeal with a certificate from the High Court of Judicature at Hyderabad raises the question whether the sum of Rs. 2,19,343 received by the assessee in the year of account relevant for the assessment year 1951-52 was a revenue receipt or a capital receipt.

The facts leading up to this appeal may be shortly stated :

The assessee is a registered firm consisting of five brothers and the wife of a deceased brother having equal shares in the profit and loss of the partnership. The firm was appointed the sole selling agents and sole distributors for the Hyderabad State for the cigarettes manufactured by Vazir Sultan Tobacco Co., Ltd., under the terms of a resolution of the Board of Directors, dated January, 6, 1931.

"Mr. Baker reported that an arrangement had been come to for the time being whereby the firm of Vazir Sultan & Sons, were given the distributorship of "Charminar" Cigarettes within the H. E. H. the Nizam's Dominions and that they were allowed a disconunt of 2 per cent. on the gross selling price."

No written agreement was entered into between the Company and the assessee in respect of the above-mentioned arrangement nor was there any correspondence exchanged between them in this behalf. In 1939 another arrangement was arrived at between the assessee and the Company whereby the assessee was given a discount of 2 per cent. not only on the goods sold in the Hyderabad State but on all the goods sold in the Hyderabad State and outside Hyderabad State. It does not appear that the Board of Directors passed any resolution in support of this new arrangement nor was any agreement drawn up between the parties incorporating the said new arrangement.

On June 16, 1950, the Board of Directors passed the following resolution reverting to the old arrangement embodied in the resolution, dated January 6, 1931 :

"The Chairman, having referred to resolution No. 24 passed at the board meeting held on 6th January, 1931 and having reported that Vazir Sultan & Sons had agreed to revert to the arrangement outlined in that resolution with effect from 1st June, 1950, it was on the proposition of Mr. S. N. Bilgrami, seconded by Mr. N. B. Chenoy resolved that payment of the sum of O.S. Rs. 2,26,263 be made to Vazir Sultan & Sons by way of compensation, Vazir Sultan & Sons, to pay D. B. Akki & Co., out of that amount the sum of O.S. Rs. 6,920 also by way of compensation. Mr. Mohd. Sultan & Mr. Hameed Sultan stated that, as partners in the firm of Vazir Sultan & Sons, they did not take part in this resolution, although they had accepted on behalf of Vazir Sultan & Sons, the terms thereof."

The sum of Rs. 2,19,343 was accordingly received by the assessee in the year of account 1359-F.

The Income-tax Officer included this sum in the assessee's total income and taxed it as a revenue receipt. On appeal the Appellate Assistant Commissioner held that the sum of Rs. 2,19,343 was not a revenue receipt but a capital receipt being compensation for the loss of the agency and as such not liable to tax. The Income-tax Officer (C Ward), Hyderabad, thereupon preferred an appeal to the Income-tax Appellate Tribunal, Bombay, which held that the said sum received by the assessee was a revenue receipt and liable to tax. The assessee then applied to the Appellate Tribunal for a reference to the High Court under section 66 (1) of the Income-tax Act and the Tribunal accordingly referred the following question of law to the High Court :—

"Whether the sum of O.S. Rs. 2,19,343 received by the assessee Firm from Vazir Sultan Tobacco Co., Ltd., is a revenue receipt or a capital receipt ?"

The High Court answered the question in favour of the assessee stating the question in a different form, *viz.*,

"Whether the sum of O.S. Rs. 2,19,343 received by the assessee firm from Vazir Sultan Tobacco Co., Ltd., is liable to be taxed under the Indian Income-tax Act ?".

The appellant thereafter applied to the High Court for a certificate of fitness which was granted by the High Court on February 21, 1955, and hence this appeal.

The question that falls to be determined is whether the sum which was in express terms of the resolution mentioned by way of "compensation" for the loss of the agency was a revenue receipt (trading receipt or an income receipt) as contended by the Revenue or a capital receipt as contended by the assessee.

It was urged on behalf of the appellant that the sole selling agency which was granted by the Company to the assessee in the year 1931 was merely expanded as regards territory in 1939 and what was done in 1951 was to revert to the old arrangement, and the structure or the profit-making apparatus of the assessee's business was not affected thereby. The expansion as well as the restriction of the assessee's territory were in the ordinary course of the assessee's business and were mere accidents of the business which the assessee carried on and the sum of Rs. 2,19,343 received by the assessee as and by way of compensation for the restriction of the territory was a trading or an income receipt and was therefore liable to tax.

It was, on the other hand, contended on behalf of the assessee that it did not carry on business of acquiring and working agencies, that the agency acquired in 1931 was a capital asset of the assessee's business of distributing Charminar cigarettes in the Hyderabad State, that the expansion of territory outside the Hyderabad State in 1939 was an accretion to the capital asset already acquired by the assessee, that the resolution of 1950 was in substance a termination or cancellation of the agency *qua* territory outside the Hyderabad State and resulted in the sterilisation of the capital asset *qua* that territory, that the sum of Rs. 2,19,343 received by the assessee in the year of account was by way of compensation for the termination or cancellation of the agency outside Hyderabad State and being therefore compensation for the sterilisation *pro tanto* of a capital asset of the assessee's business was a capital receipt and was therefore not liable to tax.

The question whether a particular receipt is a revenue receipt or a capital receipt or a particular expenditure is a capital expenditure or a revenue expenditure is beset with considerable difficulty and one finds the Revenue and the assessee ranged on different sides taking up alternative contentions as it suits their purposes. As was observed by Lord Macmillan in *Van Den Berghs, Ltd.* v. *Clark*[1] :—

> "The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be included in computing his profits and those in which the subject is found claiming that an item of disbursement ought to be included among the admissible deductions in computing his profits. In the former case the Crown is found maintaining that the item is an item of income ; in the latter, that it is a capital item. Consequently the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the taxpayer and the Crown are found alternately arguing for the restriction or the expansion of the conception of income".

The question has, therefore, to be dealt with irrespective of the one stand or the other which is taken by the Revenue or the assessee and the Court has got to determine what is the true character of the receipt or the expenditure.

In the case of the *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *The South India Pictures Ltd., Karaikudi*[2], this Court endorsed the following statement of Lord Macmillan in *Ven Den Berghs, Ltd.* v. *Clark*[1] :

> "That though in general the distinction between an income and a capital receipt was well recognized and easily applied, cases did arise where the item lay on the border-line and the problem had to be solved on the particular facts of each case. No infallible criterion or test can be or has been laid down and the decided cases are only helpful in that they indicate the kind of consideration which may relevantly be borne in mind in approaching the problem. The character of the payment received may vary according to the circumstances. Thus the amount received as consideration for the sale of a plot of land may ordinarily be a capital receipt but if the business of the recipient is to buy and sell lands, it may well be his income."

While considering the case-law it is necessary to bear in mind that the Indian Income-tax Act is not in *pari materia* with the British Income-tax statutes, it is less

1. (1935) 19 T.C. 390, 429.
2. (1956) 2 M.L.J. 21 : (1956) S.C.J. 479 : 1956 S.C.R. 223, 228.

elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in England have had to deal. Little help can therefore be gained by attempting to construe the Indian Income-tax Act in the light of decisions bearing upon the meaning of the Income-tax legislation in England. But on analogous provisions, fundamental concepts and general principles unaffected by the specialities of the English Income-tax statutes, English authorities may be useful guides. (*Vide* the observations of the Privy Council in the *Commissioner of Income-tax* v. *Shaw Wallace & Co.*[1], *Gopal Saran Narain Singh* v. *Commissioner of Income-tax*[2], *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Chunnilal B. Mehta*[3], and *Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *C. I. T., Bihar and Orissa*[4].

Before embarking upon a discussion of the principles emerging from the various decisions bearing upon this question, it is necessary to advert to an argument which was addressed to us by the learned counsel for the appellant in connection with the Privy Council decision in the *Commissioner of Income-tax* v. *Shaw Wallace & Co.*[1]. That case was relied upon by the Appellate Assistant Commissioner and the High Court as determinative of the question in favour of the assessee and it was strenuously urged before us on behalf of the Revenue that the authority of that decision was considerably shaken not only be the later Privy Council decision in *Raja Bahadur Kamakshya Narain Singh* v. *C. I. T., Bihar and Orissa*[4], but also by a decision of this Court in *Raghuvansi Mills, Ltd.* v. *Commissioner of Income-tax, Bombay City*[5].

It may be remembered that the term "income" was understood by their Lordships of the Privy Council in *Shaw Wallace's case*[1], to connote a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources. The source may not necessarily be one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall. Income was thus likened pictorially to the fruit of a tree or the crop of a field (*Ibid.*, page. 212). This concept of "income" was adopted and in substance repeated by the Privy Council in *Gopal Saran Narain Singh's case*[2], at page 213, though Lord Russell of Killowen pronouncing the opinion of the Privy Council pithily remarked that anything which can properly be described as income is taxable under the Act unless properly exempted. The case of *Raja Bahadur Kamakshya Narain Singh*[4], struck a discordant note and Lord Wright delivering the opinion of the Board observed at page 192 that it was not in the their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit or increase or sowing or reaping or periodical harvests and that such picturesque similes cannot be used to limit the true character of income in general. Lord Wright further observed at page 194 :—

> "Its applicability may in particular cases differ because the circumstances, though similar in some respects, may be different in others. Thus the profit realised on a sale of shares may be capital if the seller is an ordinary investor changing his securities, but in some instances, at any rate, it may be income if the seller of the shares is an investment or an insurance company. Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income, again, may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which "income" may assume is beyond enumeration. Generally, however, the mere fact that the income flows from some capital assets, of which the simplest illustration is the purchase of an annuity for a lump sum, does not prevent it from being income, though in some analogous cases the true view may be that the payments, though spread over a period, are not income, but instalments payable at specified future dates of a purchase price." (Vide *Secretary of State for India* v. *Scoble*[6].

This Court in *Raghuvansi Mills case*[5], also observed that the definition of income in *Shaw Wallace's case*[1], as a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources must be read with reference to the particular facts of that case.

1. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206, 212 (P.C.).
2. (1935) 69 M.L.J. 190: L.R. 62 I.A. 207, 214 (P.C.).
3. (1938) L.R. 65 I.A. 332, 349 (P.C.).
4. (1943) 2 M.L.J. 410 : L.R. 70 I.A. 180 188 (P.C.).
5. (1953) 1 M.L.J. 113 : (1952) S.C.J. 660 : 1953 S.C.R. 177.
6. L.R. (1903) A.C. 299.

It was therefore urged on behalf of the Revenue that periodicity or recurring nature of the receipt was not a necessary ingredient of "income" nor was the existence of a material external source capable of producing a recurrent return necessary before a receipt could be treated as income chargeable to tax.

We are not unmindful of this criticism of the definition of "income" adopted by the Privy Council in *Shaw Wallace & Co's case*[1], and the concept of income may have to be thus revised. But even granting the proposition that is contended for by the Revenue the result is no different in the present case because the head of income under which the assessee before us has been assessed to Income-tax is "business" a definite source from which the income in question sought to be assessed is alleged to have been derived and whether it is of a recurring or non-recurring nature therefore does not enter into the picture. The exemption from liability in regard to that income is claimed by the assessee, not on the ground of the applicability of section 4 (3) (vii) of the Income-tax Act but on the ground that it is not a revenue receipt but a capital receipt, being compensation paid by the Company to the assessee for the termination or cancellation of the agency *qua* territory outside Hyderabad State, a capital asset of the assessee's business.

What then are the considerations which have to be borne in mind in determining these vexed questions? The distinction between a capital expenditure and a revenue expenditure came up for consideration before this Court in *Assam-Bengal Cement Co. Ltd.* v. *The Commissioner of Income-tax, West Bengal*[2], and this Court laid down certain criteria for the determination as to whether a particular expenditure incurred by the assessee was a capital expenditure or a revenue expenditure. We need not therefore discuss that problem any further.

As to whether a particular receipt in the hands of an assessee is a capital receipt or a revenue receipt, we had occasion to consider the same in the *Commissioner of Inocome-tax and Excess Profits Tax, Madras* v. *The South India Pictures, Ltd., Karaikudi*[3]. The assessee there carried on the business of distribution of films. In some instances the assesee used to produce or purchase films and then distribute the same for exhibition in different cinema halls and in other cases used to advance monies to producers of films produced with the help of monies so advanced. In the course of such business it advanced monies to the Jupiter Pictures for the production of these films and acquired the rights of distribution of the three films under three agreements in writing, dated September 1941, July, 1942 and May, 1943. In the accounting year ending March 31, 1946, and in the previous years the assessee had exploited its rights of distribution of the three pictures. On October 31, 1945, the assessee and the Jupiter Pictures entered into an agreement cancelling the three agreements relating to the distribution rights in respect of the three films and in consideration of such cancellation the assessee was paid Rs. 26,000 in all by the Jupiter Pictures as compensation. It was held by the Majority of this Court that the sum received by the assessee was a revenue receipt (and not a capital receipt) assessable under the Indian Income-tax Act inasmuch as :—

(1) the sum paid to the assessee was not truly compensation for not carrying on its business but was a sum paid in the ordinary course of business to adjust the relation between the assessee and the producers of the films.

(2) the agreements which were cancelled were by no means agreements on which the whole trade of the assessee had for all practical purposes been built and the payment received by the assessee was not for the loss of such a fundamental asset as was the ship managership of the assessee in *Barr Crombie & Co., Ltd.* v. *Commissioners of Inland Revenue*[4], and

(3) one could not say that the cancelled agreements constituted the framework or whole structure of the assessee's profit-making apparatus in the same sense

1. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206, 212 (P.C.).
2. (1955) 1 M.L.J. 118 : (1955) S.C.J. 205 : (1955) 1 S.C.R. 972.
3. (1956) 2 M.L.J. (S.C.) 21 : 1956 S.C.J. 479 : 1956 S.C.R. 223, 228 (S.C.).
4. (1945) 26 Tax Cas. 406.

as the agreement between the two margarine dealers in *Van Den Berghs, Ltd.* v. *Clark*[1] was.

The criteria laid down by the majority judgment for determining whether the particular payment received by the assessee was income or was to be regarded as a capital receipt were :

(i) whether the agreements in question were entered into by the assessee in the course of carrying on its business of distribution of films, and

(ii) whether the termination of the agreements in question could be said to have been brought about in the ordinary course of business ;

so that money received by the assessee as a result of or in connection with such termination of agreements could be regarded as having been received in the ordinary course of its business and therefore a trading receipt.

A similar question arose in *Commissioner of Income-tax, Nagpur* v. *Rai Bahadur Jairam Valji*[2], where this Court followed the same line of reasoning. The question there related to a sum of Rs. 2,50,000 received by the assessee as damages or compensation for the premature termination of a contract, dated May 9, 1940. The High Court on a reference under section 66 (1) of the Income-tax Act had held that the sum was a capital receipt in the hands of the assessee, and as such not liable to be taxed. It was contended on behalf of the Revenue that the contract, dated May 9, 1940, was one entered into by the assessee in the ordinary course of his business, that the sum of Rs. 2,50,000 was paid admittedly as solatium for the cancellation of that contract, and that it was therefore a revenue receipt. The assessee on the other hand contended that the contract, dated May 9, 1940, was for a period of 25 years of which more than 23 years had still to run at the time of the settlement, and it was therefore capital in character. Moreover, the true character of the agreement was that it brought into existence an arrangement which would enable him to carry on a business and was not itself any business and any payment made for the termination of such an agreement was a capital receipt.

This Court on the facts and circumstances of the case came to the conclusion that the contract in question was entered into by the assessee in the ordinary course of business and was one entered into in the carrying on of that business. The arrangement ultimately entered into between the parties in regard to the payment of the said sum of Rs. 2,50,000 was accordingly treated as an adjustment made in the ordinary course of business and the receipt was therefore held to be an amount paid as solatium for the cancellation of a contract entered into by a person in the ordinary course of business.

In the course of the discussion reference was made to agency agreements and this Court observed :—

> "In an agency contract, the actual business consists in the dealings between the principal and his customers, and the work of the agent is only to bring about that business. In other words, what he does is not the business itself but something which is intimately and directly linked up with it. It is therefore possible to view the agency as the apparatus which leads to business rather than as the business itself on the analogy of the agreements in *Van Den Berghs, Ltd.* v. *Clark*[1]. Considered in this light, the agency right can be held to be of the nature of a capital asset invested in business. But this cannot be said of a contract entered into in the ordinary course of business. Such a contract is part of the business itself, not anything outside it as is the agency, and any receipt on account of such a contract can only be a trading receipt."

This Court further emphasised the distinction between an agency agreement and a contract made in the usual course of business and pointed out that the agreement could in any event be regarded as a capital asset of the agent which would be saleable. Such a concept would certainly be out of place with reference to a contract entered into in the course of business and any payment made for the non-performance or cancellation of such a contract could only be damages or compensation and could not, in law or fact, be regarded as an assignment of the rights

1. (1935) 19 Tax Cas. 390, 429.
2. (1959) 1 M.L.J. (S.C.) 116: (1959) 1 An. W.R. (S.C.) 116 : (1959) S.C.J. 284 : A.I.R. 1959 S.C. 291, 297 : 35 I.T.R. 148, 163.

under the contract. Once it was found that the contract was entered into in the ordinary course of business, any compensation received for its termination would be a revenue receipt, irrespective of whether its performance was to consist of a single act or a series of acts spread over a period.

While thus indicating that an agency could be treated as a capital asset of the business this Court guarded itself against its being understood as deciding that the compensation paid for cancellation of an agency contract must always and as a matter of law be held to be a capital receipt and it made the following pertinent observations :—

"Such a conclusion will be directly opposed to the decision in *Kelsall's case*[1], and the *Commissioner of Income-tax and Excess Profit Tax, Madras* v. *The South India Pictures, Ltd., Karaikudi*[2]. The fact is that an agency contract which has the character of a capital asset in the hands of one person may assume the character of a trading receipt in the hands of another, as for example, when the agent is found to make a trade of acquiring agencies and dealing with them. The principle was thus stated by Romer, L.J., in *Golden Horse Shoe (New) Ltd.* v. *Thurgood*[3] :

'The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital. The machinery that a dealer in machinery buys and sells is part of his circulating capital, as is the coal that a coal merchant buys and sells in the course of his trade. So, too, is the coal that a manufacturer of gas buys and from which he extracts his gas.' Therefore, when a question arises whether a payment of compensation for termination of an agency is a capital or a revenue receipt, it would have to be considered whether the agency was in the nature of capital asset in the hands of the assessee, or whether it was only part of his stock-in-trade. Thus in *Barr Crombie & Sons, Ltd.* v. *Commissioners of Inland Revenue*[4], the agency was found to be practically the sole business of the assessee, and the receipt of compensation on account of it was accordingly held to be a capital receipt, while in *Kelsalls' case*[1] the agency which was terminated was one of several agencies held by the assessee and the compensation amount received therefor was held to be a revenue receipt, and that was also the case in the *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *The South India Pictures, Ltd., Karaikudi.*[2]"

We may in this context also note the further observations made by this Court :—

"But apart from these and similar instances, it might, in general, be stated that payments made in settlement of rights under a trading contract are trading receipts and are assessable to revenue. But where a perosn who is carrying on business is prevented from doing so by an external authority in the exercise of a paramount power and is awarded compensation therefor, whether that receipt is a capital receipt or a revenue receipt will depend upon whether it is compensation for injury inflicted on a capital asset or on a stock-in-trade. The decision in the *Glenboig Union Fireclay Co., Ltd.* v. *The Commissioners of Inland Revenue*[5], applies to this category of cases. There, the assessee was carrying on business in the manufacture of fire-clay goods and had, for the performance of that business, acquired a fire-clay field on lease. The Caledonian Railway which passed over the field prohibited the assessee from excavating the field within a certain distance of the rails, and paid compensation therefor in accordance with the provisions of a statute. It was held by the House of Lords that this was a capital receipt and was not taxable on the ground that the compensation was really the price paid "for sterilising the asset from which otherwise profit might have been obtained." That is to say, the fire-clay field was a capital asset which was to be utilised for the carrying on of the business of manufacturing fire-clay goods and when the assessee was prohibited from exploiting the field, it was an injury inflicted on his capital asset. Where, however, the compensation is referable to injury inflicted on the stock-in-trade, it would be a revenue receipt. (Vide the *Commissioner of Inland Revenue* v. *Newcastle Breweries, Ltd.*[6]"

It is no doubt true that this Court was not concerned with any agency agreement in the last mentioned case and the observations made by this Court there were by way of *obiter dicta*. The *obiter dicta* of this Court, however, are entitled to considerable weight and we on our part fully endorse the same. The earlier case of *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *The South India Pictures, Ltd. Karaikudi*[2] was indeed a case where the assessee had entered into agency agreement for the exploitation of the three films in question, but in that case the conclusion was reached that entering into such agency agreements for acquiring the films was a part of the assessee's business and the agreements in question having been entered into by the assessee in the ordinary course of business the

1. (1938) 21 Tax Cas. 608.
2. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : 1956 S.C.R. 223, 228.
3. (1933) 18 Tax Cas. 280, 300.
4. (1945) 26 Tax Cas. 406.
5. (1922) 12 Tax Cas. 427.
6. (1927) 12 Tax Cas. 927.

cancellation of those agreements was also a part of the assessee's business and was resorted to in order to adjust the relation between the assessee and the producer of those films.

It would not be profitable to review the various English decisions bearing on this question as they have been exhaustively reviewed in the above decisions of this Court. The position as it emerges on a consideration of these authorities may now be summarised. The first question to consider would be whether the agency agreement in question for cancellation of which the payment was received by the assessee was a capital asset of the assessee's business, constituted its profit-making apparatus and was in the nature of its fixed capital or was a trading asset or circulating capital or stock-in-trade of his business. If it was the former the payment received would be undoubtedly a capital receipt; if, however, the same was entered into by the assessee in the ordinary course of business and for the purpose of carrying on that business, it would fall into the latter category and the compensation or payment received for its cancellation would merely be an adjustment made in the ordinary course of business of the relation between the parties and would constitute a trading or a revenue receipt and not a capital receipt.

We may perhaps appropriately refer at this stage to an aspect of this question which was canvassed before us with some force and it was that there was no enforceable agreement as between the assessee and the Company which could be made the subject-matter of a legal claim for damages or compensation at his instance in the event of its termination or cancellation by the Company. The agency agreement was terminable at the will of the Company and if the Company chose to do so the assessee had no remedy at law in regard to the same. It is, however, to be remembered that in all these cases one has really got to look to the nature of the receipt in the hands of the assessee irrespective of any consideration as to what was actuating the mind of the other party. As Rowlatt, J., observed in the case of *Chibbett* v. *Joseph Robinson & Sons*[1] :—

"As Sir Richard Henn Collins said, you must not look at the point of view of the person who pays and see whether he is compellable to pay or not; you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services, if it is a question of an office and in respect of his trade, if it is a question of trade, and so on. You have to look at his point of view to see whether he receives it in respect of those considerations. This is perfectly true. But when you look at that question from what is described as the point of view of the recipient, that sends you back again, looking, for that purpose, to the point of view of the payer; not from the point of view of compellability or liability, but from the point of view of a person inquiring what is this payment for; and you have to see whether the maker of the payment makes it for the services and the receiver receives it for the services".

The learned Judge further observed at page 61 :—

"'But at any rate it does seem to me that copmpensation for loss of an employment which need not continue, but which was likely to contniue, is not an annual profit within the scope of the Income-tax at all.' (See also *W. A. Guff* v. *Commissioner of Income-tax, Bombay City*[2] where the question whether the amount paid was compensation for which the employer was liable or was a payment made *ex-gratia* was considered immaterial for the purpose of the decision in that case)."

It was also urged that the agency in question before us was not an enduring asset of the assessee's business as in its very nature it was terminable at will, there being no agreement or arrangement for a fixed term between the assessee and the Company. On the analogy of the test laid down by this Court in *Assam-Bengal Cement Co., Ltd.* v. *The Commissioner of Income-tax, West Bengal*[3], while considering the distinction between a capital expenditure and a revenue expenditure, it was argued that the agency agreement in question could not be a capital asset of the assessee's business in so far as it was not of an enduring character and compensation paid for its termination could not therefore be a capital receipt in the hands of the assessee. Whatever be the position, however, in the case of the acquisition of an asset by the assessee by making a disbursement for the purchase of the same, similar considerations would not necessarily operate when the amount is received by the assessee for

1. (1924) 9 Tax Cas. 48, 60.
2. (1957) 31 I.T.R. 826.
3. (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.) 118 : (1955) 1 S.C.R. 972.

the termination or cancellation of an asset of his business. The character of such a receipt would indeed have to be determined having regard to the fact whether the asset in question was a capital asset of the business or a trading asset thereof. For this purpose it will be immaterial whether that asset was of an enduring character or was one which was terminable at will.

We have therefore got to determine whether the agency in question before us was a capital asset of the assessee's business. One of the relevant considerations in the matter of such determination has been whether the asset was in the nature of fixed capital or constituted the circulating capital or stock-in-trade of the assessee's business. This question was thus dealt with by Viscount Haldane in *John Smith & Sons* v. *Moore*[1]:—

" But what was the nature of what the Appellant here had to deal with ? He had bought as part of the capital of the business his father's contracts. These enabled him to purchase coal from the colliery owners at what we were told was a very advantagous price, about fourteen shillings per ton. He was able to buy at this price because the right to do so was part of the assets of the business. Was it circulating capital ? My Lords, it is not necessary to draw an exact line of demarcation between fixed and circulating capital. Since Adam Smith drew the distinction in the Second Book of his " Wealth of Nations ", which appears in the chapter on the Division of Stock, a distinction which has since become classical, economists have never been able to define much more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profit by keeping it in his own possession, circulatnig capital as what he makes profit of by parting with it and letting it change masters. The latter capital circulates in this sense. My Lords, in the case before us the Appellant, of course, made profit with circulating capital, by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and reselling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that though they may have been of short duration, they were none the less part of his fixed capital ".

In the case before us the agency agreement in respect of territory outside the Hyderabad State was as much an asset of the assessee's business as the agency agreement within the Hyderabad State and though expansion of the territory of the agency in 1939 and the restriction thereof in 1950 could very well be treated as grant of additional territory in 1939 and the withdrawl thereof in 1950, both these agency agreements constituted but one employment of the assessee as the sole selling agents of the Company. There is nothing on the record to show that the acquisition of such agencies constituted the assessee's business or that these agency agreements were entered into by the assessee in the carrying on of any such business. The agency agreements in fact formed a capital asset of the assessee's business worked or exploited by the assessee by entering into contracts for the sale of the "Charminar" cigarettes manufactured by the Company to the various customers and dealers in the respective territories. This asset really formed part of the fixed capital of the assessee's business. It did not constitute the business of the assessee but was the means by which the assessee entered into the business transactions by way of distributing those cigarettes within the respective territories. It really formed the profit making apparatus of the assessee's business of distribution of the cigarettes manufactured by the Company. If it was thus neither circulating capital nor stock-in-trade of the business carried on by the assessee it could certainly not be anything but a capital asset of its business and any payment made by the Company as and by way of compensation for terminating or cancelling the same would only be a capital receipt in the hands of the assessee.

It would not make the slightest difference for this purpose whether either one or both of the agency agreements were terminated or cancelled by the Company. The position would be the same in either event. As was observed by Lord Wrenbury in the *Glenboig Union Fire-Clay Co., Ltd.* v. *The Commissioners of Inland Revenue*[2], at page 465 :—

" The matter may be regarded from another point of view ; the right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to work the whole

1. (1921) 12 Tax Cas. 266, 282.
2. (1922) 12 Tax Cas. 427.

area demised. Had the abandonment extended to the whole area all subsequent profit by working would, of course have been impossible but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilising the asset from which otherwise profit might have been obtained. *What is true of the whole must be equally true of part.*"

If both the agency agreements, *viz.*, one for the territory within the Hyderabad State and the other for the territory outside Hyderabad State had been terminated or cancelled on payment of compensation, the whole profit-making structure of the assessee's business would have been destroyed. Even if one of these agency agreements was thus terminated, it would result in the destruction of the profit-making apparatus or sterilisation of the capital asset *pro tanto* and if in the former case the receipt in the hands of the assessee would only be a capital receipt, equally would it be a capital receipt if compensation was obtained by the assessee for the termination or cancellation of one of these agency agreements which formed a capital asset of the assessee's business.

The facts of the present case are closely similar to those which obtained in the *Commissioner of Income-tax* v. *Shaw Wallace & Co*[1]. In that case also the assessees had for a number of years prior to 1928 acted as distributing agents in India of the Burma Oil Company and the Anglo-Persian Oil Company, but had no formal agreement with either Company. In or about the year 1927 the two companies combined and decided to make other arrangements for the distribution of their products. The assessee's agency of the Burma Company was accordingly terminated on December 31, 1927, and that of the Anglo-Persian Company on June, 30, following. Some time in the early part of 1928 the Burma Company paid to the assessee a sum of Rs. 12,00,000 "as full compensation for cessation of the agency" and in August of the same year the Anglo-Persian Company paid them another sum of Rs. 3,25,000. as " compensation for the loss of your office as agents to the company ". On the facts and circumstances of the case the Privy Council came to the conclusion that the sums could only be taxable if they were the produce, or the result of, carrying on the agencies of the oil companies in the year in which they were received by the assessees. But when once it was admitted that they were sums received, not for carrying on that business, but as some sort of solatium for its compulsory cessation, the answer seemed fairly plain. Whatever be the criticism in regard to the concept of income adopted in this case noted earlier in this judgment, the decision could just as well be supported on the grounds which we have hereinbefore discussed and was quite correct, the payments having been received by the assessees as and by way of compensation for the termination or cancellation of the agency agreements in question which were in fact the capital assets of the assessee's business.

The Appellate Assistant Commissioner as well as the High Court were thus justified in the conclusion to which they came, *viz.*, that the sum of Rs. 2,19,343 received by the assessee from the Company was a capital receipt.

The result, therefore is that the appeal fails and will stand dismissed with costs throughout.

Kapur, J.—I have had the advantage of perusing the judgment prepared by my learned brother Bhagwati J., but with great respect I am unable to agree and my reasons are these:

The sole question for determination in this case is as to whether a sum of Rs. 2,26,263 received by the assessees from Vazir Sultan Tobacco Co., Ltd., as compensation for the termination of their agency for the distribution of ' Charminar ' cigarettes in areas of India other than Hyderabad State is or is not taxable in the hands of the assessees. The answer to this question depends on whether the amount has been received by the assessees as a capital or a revenue receipt. In 1931 the assessees were appointed distributing agents for Hyderabad State only and for the rest of India in 1939, the agency commission in each case being a discount of 2 per cent. on the gross selling price. The agency of 1939 was terminated by a resolution dated June 16, 1950, on payment of the compensation amount already mentioned but the

1. (1932) L.R. 59 I.A. 206, 212: 63 M.L.J. 124.

assessees continued to be distributors for Hyderabad State. It must here be mentioned that the agency in question was terminable at will, and that any compensation paid for it would *prima facie* be revenue.

During the accounting year the amount of income, profits and gains of the assessees from the cigarette distribution business and from another source, *i.e.*, Acid Factory within the State of Hyderabad was Rs. 4,53,159. The order of the Income-tax Officer or the Appellate Tribunal does not show how much of this sum was attributable to the Cigarette distribution business and how much to the other source. There is no finding as to how and to what extent, if any, the business of the assessees was affected by the cesser of distribution business outside that State.

The question now arises: did the assessees receive the compensation in lieu of the commission they otherwise might or would have earned if the agreement had continued or did they receive it as compensation for the destruction of a profit-making asset. The answer to this question would again be dependent upon whether the receipt in question is attributable to a fixed capital asset or to circulating capital. These two terms have been used in a number of cases but as applied to agencies compensation will be a capital receipt if it is received as the value of the agency, *i.e.*, it is a price of the business as if it is brought to sale. On the other hand it is revenue receipt if it is paid in lieu of profits or commission. In *Van Den Berghs, Ltd.* v. *Clark*[1], Lord Macmillan described circulating capital as

"capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process and remains unaffected by it".

As was said by Lord Macmillan in the same case, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question. Ultimately it must depend upon the facts of a particular case.

The assessees rested their case on the decision of the Privy Council in *Commissioner of Income-tax* v. *Shaw Wallace & Co.*,[2] on which the High Court has mainly relied. In that case the assessees carried on business in India as merchants and agents for various companies. They were distributing agents for two oil companies. These two agencies were terminated and a sum of Rs. 12,00,000 was paid as compensation for the loss of these agency rights and the question was whether this was a capital payment. It was held to be a capital and not a revenue receipt because the sum received was not the result of carrying on the agencies of the oil companies, in other words, it could not be regarded as profits or gains from carrying on the business but was received in the nature of a solatium for cessation. The case was decided on the interpretation of the word business as defined in section 2 (4) of the Income-tax Act, under which it "includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture." These words, it was held were wide "but underlying each of them is the fundamental idea of the continuous exercise of an activity which was also the idea underlying the relevant words of section 10 (1) of the Act, "in respect of the profits or gains of any business carried on by him", *i.e.*, it is to be the profit earned by a process of production. The test of income was its periodicity because it connotes a periodical monetary return. This test of periodicity was not accepted by the Privy Council itself in *Raja Bahadur Kamakshya Narain Singh's case*[3]. Lord Wright there said "income is not necessarily the recurrent return from a definite source, though it is generally so ". The test of periodicity was rejected by this Court in *Raghuwanshi Mills, Ltd.* v. *Commissioner of Income-tax*[4], where Bose, J., said that the remarks of periodical monetary return must be confined to the facts of that case and it was held that money received from an insurance company for insurance against losses was income representing loss of profits as opposed to loss of capital. In a later case *The Commissioner of Income-tax* v. *The South India Pictures, Ltd.*[5], it was said that if Shaw Wallace & Co. had other agencies

1. (1935) 19 T.C. 390.
2. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 (P. C.).
3. (1943) 2 M.L.J. 410 : L.R. 70 I.A. 180 (P.C.).
4. (1953) 1 M.L.J. 113: (1952) S.C.J. 660 : 1953 S.C.R. 177, 183 (S.C.).
5. (1956) 2 M.L.J. (S.C.) 21 : (1956) S.C J. 479. : 1956 S.C.R. 223, 232.

similar to those of the two oil companies it would be difficult to reconcile the decision in that case with the later decisions in *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue*[1], and other cases (per Das, C.J.). In view of the decision in the *South India Pictures case*[2] and the observations of Bose J., in the case of *Raghuwanshi Mills, Ltd.*[3] the authority of *Shaw Wallace & Co.'s case*[4] must be taken to be considerably shaken. We have then to see how the question has to be determined.

Various tests have been laid down in decided cases. According to Lord Cave, L.C., an expenditure made not only once and for all but with a view to bringing into existence an asset or an advantage for the eudaring benefit of a trade has been treated as properly attributable to capital and not to revenue. (*British Insulated Cables*)[5]. According to Lord Atkinson the word "asset" need not be confined to "something material" and Romer, L.J., has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character. (*Anglo Persian Oil Co.* v. *Dale*[6]). If the receipt represents the aggregate of profits which an assessee would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed[7] but it is not necessarily in itself an item of income (per Lord Buckmaster in *Glenboig Union Fireclay Co.*[8].)

In *Van Den Berghs' case*[9] there were three agreements between a British and a Dutch company operative till 1940 making it possible for them to carry on their business in 'friendly alliance' and providing for the sharing of profits in certain proportions. The agreements were terminated in 1927 and the Dutch Company paid the English Company a sum of £450,000 as compensation. The question was the character of the receipt—whether capital or revenue. It was held by the House of Lords that it was the former because the agreements were not

> "ordinary commercial contracts in the course of carrying on their trade; they were not contracts for the disposal of their employees or for the engagement of agents or other employees for the conduct of their business nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the agreements related to the whole structure of the recipient's profits-making apparatus. They regulated its activities, defined what it might or it might not do and affected the whole conduct of its business".

According to Lord Macmillan if the agreements formed the fixed frame work within which the circulating capital operated, then they are not incidental to the working of its profit-making machine but were essential parts of the mechanism itself and therefore they would result in a capital receipt and not revenue receipt. Thus the agreements were designed to ensure that the business was carried on to the best advantage but they did not themselves form part of the business. They were not agreements which must be regarded as pertinent to trading activities which yielded profits. As such the totality of payments on account of those agreements were held to be a capital receipt.

The various decided cases demarcate the areas on the two sides of the line in which a receipt may lie and in every case it has to be determined as to whether it falls on one side or the other. The simplest case is of income from property or business as distinct from something received in lieu of property or business itself. One illustration of this is insurance against fire, destruction or damage and insurance against loss of profit, the former would bring in compensation in the nature of a capital. Another instance is where the whole business is bought over and the receipt is the price of the business itself as opposed to a lump sum payment for the loss of profit calculated on a proper basis. The test of income *i.e*, periodicity or recurrence at fixed intervals has been doubted in this Court: *Raghuwanshi Mills case*[3].

Another test is afforded by cases of tangible immoveable property. If an owner of such property is paid compensation for not working a part of his property *e.g.*, a

1. (1938) 21 T.C. 608.
2. (1956) 2 M.L.J. (S.C.) 21: (1956) S.C.J. 479: 1956 S.C.R. 223, 232.
3. (1953) 1 M.L.J. 113: (1952) S.C.J. 660: (1953) S.C.R. 177, 183.
4. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206 (P.C.).
5. L.R. (1926) A.C. 205, 213, 222.
6. L.R. (1932) 1 K.B. 124, 146.
7. Van. Den. Berghs, Ltd. case. 19 T.C. at p. 431.
8. (1922) 12 T.C. 427, 464.
9. (1935) 19 T.C. 390.

part of the demised premises the compensation is not profit because it is payment for sterilising that part of the asset from which otherwise profit might have been obtained. (*Glenboig Union Fire Clay case*[1].) There is no difference in cases of this kind whether the abandonment extends to the whole area or is circumscribed to a part because in either case it is sterilising an asset from which otherwise profit might have been obtained.

"It makes no difference whether it may be regarded as a sale of the asset out and out or it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the asset of the company to that extent has been sterilised or destroyed".

Another test is whether the agreement related to the whole structure of reipients profit-making apparatus and affected the whole conduct of his business or was the loss of a part of the fixed framework of the business. If it is, it is capital (*Van Den Bergh's case*[2]). But compensation for temporary and variable elements of the recipient's profit-making apparatus would be revenue (*MacDonald's case*[3]). If the agreement affects the whole structure and character of the recipient's business then it is capital but not if the structure of the business is so designed as to absorb the shocks as by the cancellation of one agency (*Kelsall Parsons' case*[4]). In *Bush Beach and Gent, Ltd.* v. *Road*[5], again the test of how the cancellation of the agreement affected the recipient's business was applied. *Barr Crombie's case*[6], is a case of capital asset as there the recipient lost his entire business which resulted in reduction of staff, salaries and even in office accommodation. The result was the cesser of its trading existence. The transaction took the form of a transfer for a price from one party to another of something that formed part of the enduring asset of one of them. Compensation for the loss of an agency would be for the loss of a capital asset if the termination of the agency was a damage to the recipient's business structure such as to destroy or materially cripple the whole structure involving serious dislocation of the normal commercial organisation but if it was merely compensation for the loss of trading profit *i.e.*, in respect of commissions or it took the place of commission that would have been earned if the engagement had continued then it is revenue. (*Wiseburg* v. *Domville*[7]). So that the decision as to whether compensation was capital or revenue would depend upon whether the cessation of the agency destroys or materially cripples the whole structure of the recipient's profit-making apparatus or whether the loss is of the whole or part of the framework of business.

If we apply these tests to the agreement which has been terminated in the present case, it does not fall in any of the class of cases of destruction of a capital asset.

For the appellant reliance was placed on the observations of Venkatarama Aiyar, J. in *Commissioner of Income-tax* v. *Rai Bahadur Jairam Valji*[8] where it was pointed out that in an agency contract the actual buiness consists in the dealings between the principal and his customers and the work of the agent is only to bring about that business. In other words what the agent does is not business itself but something which is intimately and directly linked with it. But an examination of the context shows that that is not what these observations mean. The point that was to be decided in that case was whether a payment of compensation for the cancellation of a trading contract was a capital or revenue receipt, and dealing with decisions relating to the cancellation of agency contracts which were quoted in support of the contention that they were capital, the learned Judges observed that considerations applicable to agency contracts were inapplicable to trading contracts, because the two classes of contracts were essentially different, and these differences were there pointed out. The purpose of these observations was to show that receipts from trading contracts were revenue and not that receipts from agency contracts are capital. That that is the true scope of these observations is clear from the following passage :

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1. (1922) 12 T.C. 427, 464.
2. (1935) 19 T.C. 390.
3. (1955) 36 T.C. 388.
4. (1938) 21 T.C. 608.
5. (1939) 22 T.C. 519.
6. (1945) 26 T.C. 406.
7. (1956) 36 T.C. 527.
8. (1959) 1 M.L.J. (S.C.) 116 : (1959) 1 An. W.R. (S.C.) 116 : (1959) S.C.J. 284 : (1959) 35 I.T.R. 148, 161, 163.

"In holding that compensation paid on the cancellation of a trading contract differs in character from compensation paid for cancellation of an agency contract, we should not be understood as deciding that the latter must always, and as a matter of law be held to be a capital receipt. Such a conclusion will be directly opposed to the decisions in *Kelsall's case*[1] and *Commissioner of Income-tax* v. *South India Pictures, Ltd.*[2]. The fact is that an agency contract which has the character of a capital asset in the hands of one person may assume the character of a trading receipt in the hands of another, as, for example, when the agent is found to make a trade of adquiring agencies and dealing with them."

The Court there observed that when the assessee holds a number of agencies, the compensation paid for cancellation of any of them could be regarded as revenue receipt. This is inconsistent with the conclusion that an agency contract must always be regarded as a capital asset. The learned Judges further observed that they were not elaborating this part as they were there concerned with a trading contract and therefore the statement as to when receipts from agency contracts could be regarded as revenue receipts cannot be read as exhausting the circumstances under which they could be held to be revenue.

As a matter of fact there are three kinds of cases of agencies shown by the decided cases: (1) *Kelsall Parsons' case*[1] where the recipient was carrying on several agencies and the test laid down was whether the business structure could absorb a shock of the termination of one. (2) The other is whether the compensation is for a temporary and variable element of assessee's profit-making apparatus; *Mac Donald's case*[3]. The third class of cases is represented by *Fleming & Co.'s case*[4] where the rights and advantages surrendered were such as to destroy or materially cripple the whole structure of the profit-making apparatus.

The agencies themselves are of different kinds: (1) whether the agent himself carries on the business and sells the product of the principal and gets commission for it; (2) where the agent's function is confined to bringing the principal and the customer together and he gets agency commission for the performance of only that service; (3) where the agent is a distributor and distributes the products of the principal through his sub-agents and charges commission for the distribution work. Cases (1) and (3) would not strictly fall within the scope of the observations in *Commissioner of Income-tax* v. *R. B. Jairam Valji*[5] and case (2) would fall within the second class of agreements mentioned in *Van Den Bergh's case*[6].

The agreement which is now before us and which was surrendered was terminable at will. The amount of profit which the assessee made from working the agency contract in Hyderabad State alone was much more than the amount which the assessees received for the termination of the whole of their agency outside the State. Thus it is clear that the termination did not affect the trading activities of the assessees and therefore the termination of the contract viewed against the background of the assessee's business organisation and profit-making structure appears to be no more than compensation of the loss of future profit and commission. The true effect of the facts of this case appears to be this that in 1939 the assessee's area of distribution was increased from the State of Hyderabad to the whole of India and in 1950 it was again reduced to the original area of 1931. The assessees never lost their agency. As a result of this contraction of area they at the most have lost some agency commission. The compensation therefore was in the nature of surrogatum and in this view of the matter it is revenue and not capital.

I would therefore allow this appeal with costs throughout.

ORDER.—In accordance with the majority judgment of the Court, the appeal is dismissed with costs throughout.

Appeal dismissed.

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1. (1938) 21 T.C. 608.
2. (1956) S.C.J. 479; (1956) 2 M.L.J. (S.C.) 21: (1956) S.C.R. 223, 232.
3. (1955) 36 T.C. 388.
4. (1951) 33 T.C. 57.
5. (1959) S.C.J. 284: (1959) 1 M.L.J. (S.C.) 116: (1959) 1 An.W.R. (S.C.) 116: (1959) 35 I.T.R. 148, 161, 163.
6. (1935) 19 T.C. 390.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. SUBBA RAO, JJ.

Balakrishna Savalram Pujari Waghmare and others .. *Appellants**.

v.

Shree Dnyaneshwar Maharaj Sansthan and others .. *Respondents*.

Limitation Act (*IX of* 1908), *Article* 124 *and section* 23—*Applicability—Suit for possession of hereditary office—Plaintiffs, hereditary pujari guravs—Defendants, trustees of the* Sansthan *in management—Continuing wrong, test of.*

In 1911 the trustees of the Anandi *Sansthan* resolved to dismiss eleven of the guravs from the temple service and served notices on them terminating their services and other notices were sent to the other guravs calling upon them to agree to serve the *Sansthan* on conditions specified in the notice. Two of the guravs filed a suit O.S. No. 485 of 1911 claiming a declaration about their rights of ownership and for consequential reliefs, which was dismissed but the High Court remarked that the guravs had a hereditary right of worship in the shrine and in a suit under section 92, Civil Procedure Code, such rights could be adjudicated. The Judgment of High Court was in August, 1921.

Taking advantage of some suits by worshippers against the trustees the guravs took forcible possession of their offices in 1922 whereupon the trustees filed a suit under section 9 of the Specific Relief Act, obtained a decree on November 4, 1922 and in execution got possession and evicted the guravs in November 16, 1922.

The present suits giving rise to these appeals were filed in 1933 and following years for declaration of their hereditary rights and an injunction restraining the trustees from interfering with those rights and also for accounts of the income received prior to suit and also future income upto decree.

The trial Court decreed the suits overruling the contention that the suits were barred under Article 124 of the Limitation Act (IX of 1908) and holding that section 23 applied, and that on the merits the claims were made out. The High Court on appeal holding that the claims to the hereditary rights were established dismissed the suits as barred under Article 120 of the Limitation Act.

Hence the appeal by the plaintiff to the Privy Council which came before the Supreme Court for disposal.

Held: Assuming the suits were in substance for possession of hereditary office for the purpose of these appeals, the points for decision are (i) whether Article 120 applied as held by the High Court or (ii) section 23 applied as contended for by the appellants.

Article 124 applies to suits for possession of hereditary offices, the period is 12 years and it begins to run when the defendant takes possession of the office 'adversely' to the plaintiff. In dealing with the said Article 124 the provision in column 3 cannot be ignored. For it to apply, (i) the claim must be one for the possession of a hereditary office and (ii) the claim must be made against a defendant who has taken possession of the office 'adversely' to the plaintiff. Unlike Article 142 where the plaintiff could be defeated by the plaintiff not having been in possession for 12 years period, under Article 124 he can be defeated only by the 'adverse' possession of the defendant for the prescribed period of 12 years.

In the instant cases, the worshippers who were performing the services in the place of plaintiffs are not parties; the trustees are the defendants and as they are not holding the offices themselves Article 124 could not therefore apply.

If Article 124 does not apply the article applicable is the residuary Article 120 the period being 6 years. The High Court was right is holding that the cause of action for the suits arose when the suit under section 9 of the Specific Relief Act was instituted on September 12, 1922, or at any rate when that suit was decreed on November 4, 1922, in execution of which the guravs were dispossessed. The suits filed long after the 6 years' period are barred by time.

Section 23 of the Limitation Act cannot be availed of to save the suits from the bar of Article 120. Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of the continuing wrong that it is an act which creates a continuing source of injury rendering the doer responsible and liable for the continuance of the injury. If a wrongful act causes an injury which is complete there is no continuing wrong even if the resulting damage may continue. There is a distinction between the injury caused by the wrongful act and what may be described as the effect of the injury. There can be no doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of that ouster and there is no scope for the application of section 23 in such a case.

It is difficult to hold that the trustees' act in denying the rights claimed by the plaintiff as hereditary worshippers and in claiming and obtaining possession by their suit in 1922 was a continuing wrong. The decree obtained in that suit had completely and effectively injured the appellants'

* C.As. Nos. 220 to 223 of 1953. 26th March, 1959.

rights though the damage caused continued subsequent to the decree. There is no reason to differ from the opinion of the High Court that there would be no scope for the application of section 23.

Appeals from the Judgment and Decrees, dated the 14th April, 1943, of the Bombay High Court in Appeals Nos. 183, 184, 185 and 186 of 1942, arising out of the Judgments and Decrees, dated 16th February, 1942, of the Court of the 1st Class Sub-Judge, Poona, in Suits Nos. 900/37, 392/35, 875/36 and 1202/33.

V. P. Rege and *Naunit Lal,* Advocates for Appellants.

N. C. Chatterjee, Senior Advocate *K. V. Joshi, K. Sundararajan* and *Ganpat Rai,* Advocates, with him) for Respondents Nos. 1 to 6.

The Judgment of the Court was delivered by

Gajendragadkar, J.—These four appeals represent the last stage of a long and tortuous litigation between the appellants Waghmares (also called guravs) who claim the rights of hereditary worshippers in the Shree Dnyaneshwar Maharaj Sansthan, Alandi, and respondents 1 to 6 who are the trustees of the said Sansthan. Alandi, which is a small town situated on the banks of the river Indrayani at a distance of about 14 miles from Poona, is regarded as a holy place of pilgrimage by thousands of Hindu devotees. In the last quarter of the 13th century Shree Dnyaneshwar Maharaj, the great Maharashtra Saint and Philosopher, lived at Alandi. He was a spiritual teacher and reformer ; by his saintly life and his inspiring and illuminating commentary on the Bhagvad Gita, known as Dnyaneshwari, he helped to create a popular urge and fervour for religious and social revolution which led to the foundation of a devotional cult ; the followers of this cult are known as Warkaris in Maharashtra. They refuse to recognise any barriers of caste or class ; and amongst them prevails a feeling of real and genuine spiritual brotherhood. Every year, in the months of July and November, thousands of them proceed on pilgrimage on foot and accompany the annual palanquin procession from Alandi to Pandharpur. Pandharpur is the chief centre of pilgrimage in Maharashtra and it is regarded by devotees as the Banares of Southern India. About 1300 A.D., Shree Dnyaneshwar Maharaj took *samadhi* at Alandi and since then Alandi also has become a place of pilgrimage.

In or about 1500 A.D. a big temple was erected in front of the idol of Shiva called Siddheshwar where the said Shree Dnyaneshwar Maharaj took his *samadhi*. In due course the Mahratta Kings and the Peshwas of Poona granted the village of Alandi in *inam* for the upkeep of the temple and the *samadhi*. About 1760 A.D. Peshwa Balaji Baji Rao framed a budget called *Beheda* or *Taleband* in order to regulate the management and worship of the shrine and provided for proper administration of its annual revenue amounting to Rs. 1,725. The appellants claim that their ancestors were then in possession of the temple and management of its affairs especially the worship of the shrine. The budget framed by the Peshwa shows that out of the sum of Rs. 1,725 an amount of Rs. 361 was assigned to the worshippers for some of their services.

After the fall of the Mahratta power the management of Alandi passed into the hands of the East India Company which continued the old arrangement without any interference. In 1852, under orders fom the Government of Bombay the Collector of Poona drew up a yadi or memorandum appointing six persons as Punchas (trustees) with directions to them for the management of the temple in accordance with the old tradition and practice as well as for the administration of the revenue of the village subject to the control and sanction of the Collector. This arrangement came to be described as " the scheme of 1852."

In 1863 the Religious Endowment Act was passed, and in consequence, in 1864 the Government of Bombay withdrew their superintendence over the affairs of the Alandi Sansthan ; and the trustees continued to manage the affairs of the temple without any supervision on the part of the Government. It was during this period that the appellants' ancestors began to assert that they were the owners of the shrine while the trustees insisted on treating them as the servants of the shrine. This conflict inevitably led to several disputes between the worshippers and the trustees.

Matters appear to have come to a crisis in 1911 when the trustees dismissed eleven guravs from the temple service on the ground that they were found guilty of gross misconduct. The guravs nevertheless asserted that they were the owners of the shrine and that the trustees had no authority or power to dismiss them. Taking their stand on their ownership of the shrine some of the dismissed guravs filed Civil Suit No. 485 of 1911 in the Court of the Subordinate Judge, Poona, against the trustees and this was the beginning of the long-drawn-out litigation which followed between the parties. In that suit the guravs claimed a declaration that they were the owners of the temple and not the servants of the temple committee; and as owners they were entitled to perform the worship at the shrine and to appropriate the offerings made to the idol of the Saint. This claim was resisted by the trustees who pleaded that the guravs were merely the servants of the temple committee and not the owners at all. On April 20, 1917, the learned trial judge dismissed the suit because he held that the guravs were not the owners of the shrine and were not entitled to the declarations claimed by them. Against this decision the guravs preferred several appeals but these appeals were dismissed on August 3, 1921. While dismissing their appeals the High Court incidentally expressed the view that it was open to the guravs to come to terms with the temple committee and that the terms on which the guravs could be reinstated can be decided appropriately in a suit filed under section 92 of the Code of Civil Procedure. It was also observed by the High Court in its judgment that the temple committee did not dispute the fact that the guravs were the hereditary pujaris and that they had some rights in that capacity. No doubt the committee claimed that under the scheme framed in 1852 it was competent to dismiss hereditary servants for a substantial cause such as gross misconduct.

It appears that instead of adopting the course indicated in the judgment of the High Court and filing a suit under section 92 of the Code, the guravs chose to take the law into their own hands, and obtained forcible possession of the temple premises on July 25, 1922, and began to perform the puja and to take the offerings placed before the deity as they had been doing prior to their dismissal. This was followed by a suit filed by the trustees on September 12, 1922 (Suit No. 1075 of 1922) under section 9 of the Specific Relief Act. This suit terminated in a decree in favour of the committee on November 4, 1922. In pursuance of this decree the committee recovered possession of the temple on November 16, 1922. Thus the guravs had occupied the temple precincts for about three and a half months.

When the guravs were thus disposessed by the committee in execution of the decree obtained by it, some of them proceeded to file Suit No. 19 of 1922 in the District Court of Poona; this suit purported to be one under section 92 of the Code but it claimed the same reliefs as had been claimed by the guravs in their earlier suit of 1911. On April 25, 1927, the District Court dismissed this suit on the ground that the guravs could not reagitate the same questions over again. It was held that their claim was barred by the decision of the earlier Suit No. 485 of 1911. Against this decision the guravs appealed to the High Court (First Appeal No. 507 of 1927); but the High Court agreed with the conclusion of the District Court and dismissed the guravs' appeal on June 20, 1933. It was held by the High Court that the suit as framed was not properly constituted under section 92 of the Code.

It was at this stage that a properly constituted suit No. 7 of 1934, was filed under section 92 of the Code by the general public of Alandi along with two guravs in the District Court at Poona. This suit claimed that a proper scheme should be framed for the management of the temple. Even so, one of the allegations made in the plaint referrd to the guravs' rights as hereditary worshippers. It was apparently apprehended that this allegation would be treated as outside the scope of a scheme suit under section 92 and so the guravs took the precaution of filing four separate suits on behalf of four branches in the Waghmare family one after the other. These suits were numbered as 1202 of 1933, 392 of 1935, 875 of 1936 and 900 of 1937; the plaintiffs in these suits were respectively the members of the third, the fourth, the first and the second branch of the Waghmare family. It appears that the hearing of these suits were stayed by an order of the District Judge pending the final decision of the scheme suit which was being tried by him.

The scheme suit was taken up for hearing in 1937. As many as 22 issues were framed in this suit and voluminous evidence was recorded. In the result the learned judge substantially confirmed the original scheme of 1852, though he issued certain directions modifying it. This decree was passed on December 11, 1937. The trustees felt aggrieved by this decree and challenged its propriety by preferring an appeal, No. 92 of 1938, in the Bombay High Court. On November 16, 1939, the High Court dismissed the appeal though it made some amendments in the scheme framed by the District Judge by consent of the parties.

After the scheme suit was thus disposed of by the High Court, the four suits filed by the pujaris were taken up for trial by the learned Subordinate Judge, First Class, Poona. In all these suits the appellants claimed their rights as hereditary vatandar Pujari Gurav Servants of the *Sansthan.* They alleged that they were under a duty to perform worship according to certain rites in Shree Dnyaneshwar *Sansthan* and that they were also under an obligation to perform other incidental duties enumerated by them in their plaints. Likewise they claimed that for remuneration they were entitled to receive coins and perishable articles offered by the devotees and the committee as well as yearly emoluments from the committee. On these allegations the appellants claimed a declaration about their respective rights and an injunction permanently restraining the trustees from obstructing the appellants in the exercise of the said rights. They also claimed accounts from the trustees in regard to the offerings prior to the institution of the suit as well as those made after the institution of the suit and before the passing of the decree.

These allegations were denied by respondents 1 to 6. Their case was that the appellants were the servants of the temple committee and as such had no hereditary rights set up by them. In the alternative, it was pleaded by them that even if the appellants had any hereditary rights the same had been lost by their miconduct and had been otherwise extinguished by limitation. Against the appellants' claim pleas of *res judicata* and estoppel were also raised.

On these pleadings as many as 21 issues were framed in the trial Court. The trial Court found in favour of the appellants on all the issues. The learned judge held that the guravs had established the hereditary rights set out by them and he was inclined to take the view that the respondents could not deprive the appellants of their hereditary rights of service because of the misconduct of some of their ancestors. He also found that there was no substance in the plea of estoppel or *res judicata* and that the suits were not barred by limitation. In the result the appellants' suits were decreed on February 16, 1942.

Thereupon the respondents challenged these decrees by preferring appeals against them in the Bombay High Court. The four suits accordingly gave rise to First Appeals Nos. 183, 184, 185 and 186 of 1942 respectively. In these appeals the High Court agreed with the trial Court in holding that on the merits the appellants had established their case and that their claim was not barred either by *res judicata* or by estoppel. However, on the question of limitation the High Court took the view that the appellants' suits were governed by Article 120 of the Limitation Act and that they had been filed beyond the period of six years prescribed by the said article. That is why the High Court set aside the decrees passed by the trial Court, allowed the respondents' appeals and dismissed the appellants' suits. However, in view of the special facts of the case the High Court directed that each party should bear its own costs throughout. This judgment was pronounced on April 14, 1943. Like the trial Court the High Court also dealt with all the four cases by one common judgment.

It appears that after this judgment was pronounced by the High Court but before it was signed, the appellants moved the High Court on July 2, 1943, for a rehearing of one of the appeals (No. 186 of 1942). It was urged before the High Court that even if Article 120 applied the claim made by the appellant in the said appeal (which arose from Suit No. 1202 of 1933) could not be held to be barred by limitation. The High Court was not impressed by this plea and so the motion for rehearing was discharged.

Subsequently a Civil Application, No. 1039 of 1944, was made by the appellant in the said appeal seeking to raise the same point over again but this application was rejected by the High Court on September 12, 1944.

The appellants then applied for leave to appeal to the Privy Council on August 15, 1944. Their applications were heard together and were disposed of by an order passed on March 26, 1946, whereby leave was granted to them to appeal to the Privy Council and their prayer for consolidating all the appeals was also allowed. These appeals could not, however, be disposed by the Privy Council before the jurisdiction of the Privy Council to deal with Indian appeals came to an end and so they ultimately came to this Court and were numbered as Appeals Nos. 220 to 223 of 1953. It may be convenient to state that these appels arise respectively from Suits Nos. 907 of 1937, 392 of 1935, 875 of 1936 and 1202 of 1933. It would thus be seen that the litigation which began between the parties in 1911 has now reached its final stage before us in the present appeals.

As we have already indicated, both the Courts below have found in favour of the appellants on most of the issues that arose in the present litigation ; but the appellants have failed in the High Court on the ground of limitation. In the trial Court the respondents had urged that the present suits were governed by Article 124 of the Limitation Act and that since the guravs had been dismissed from service in 1911 and other guravs refused to serve in 1913 and 1914 limitation began to run against them at least from 1914 and so the suits were beyond time The learned trial judge held that Article 124 was inapplicable. He also found alternatively that, even if the said Article applied, the trustees did not have continuous possession of the suit properties from 1911 or 1914 for twelve years and so the suits were not barred by time. According to him the case was really covered by section 23 of the Limitation Act, and so the plea of limitation could not succeed.

The High Court has agreed with the trial Court in holding that Article 124 is inapplicable. It has, however, come to the conclusion that the suits are governed by Article 120 of the Limitation Act, and, according to its findings, limitation began to run against the appellants either from September 12, 1922, when the trustees filed their suit under section 9 of the Specific Relief Act, or, in any case from November 1922, when, in execution of the decree passed in the said suit, the appellants were driven out of the temple precincts by the trustees. The High Court has also held that section 23 can have no application to the present case. That is how the High Court has reached the conclusion that the appellants' suits are barred by time under Article 120. The question which arises for our decision in the present appeals, therefore, is one of limitation ; it has to be considered in two aspects ; was the High Court right in holding that Article 120 applies and that the cause of action accrued more than six years before the dates of the institution of the present suits ? Was the High Court also right in holding that section 23 does not apply to the suits ?

On behalf of the appellants Mr. Rege has contended that in substance, in their present suits the appellants have made a claim for possession of an hereditary office and as such they would be governed by Article 124 of the Limitation Act. In this connection he has referred us to the relevant allegations in the plaint to show that the appellants' prayer for a declaration about their hereditary rights and for a consequential permanent injunction amount to no more and no less than a claim for possession of the said hereditary office. In support of this argument reliance has been placed on the decision of the Bombay High Court in *Kunj Bihari* v. *Keshavlal Hiralal*[1]. In that case the plaintiff had made a claim to the gadi of the Swaminarayan temple at Ahmedabad and had asked for a declaration that the will of the last Acharya which purported to appoint defendant 14 as his adopted son and successor was null and void. As a consequence a perpetual injunction was also claimed restraining the defendants from offering any obstruction to the plaintiff in occupying the said gadi. The principal point which was decided in the case had reference to the effect of the provisions of section 42 of the Specific Relief Act. The plaintiff's suit had been dismissed in the Courts below on the ground that he had omitted to ask

1. (1904) I.L.R. 28 Bom. 567.

for further relief as he was bound to do under section 42 of the said Act and the High Court held that the section did not empower the Courts to dismiss the suit under the said section. In considering the nature of the claim made by the plaintiff, Jenkins, C.J., observed that:

> "In the plaintiff's view the suit was not one of possession of land appertaining to the gadi but to determine who was to occupy the gadi and thus as gadinishin become the human agent of the deity. If that was so, then the injunction restraining all interference with the occupancy by the plaintiff of the gadi secures in the most complete manner to him the rights he claims".

The learned Chief Justice also observed that

> "the plaintiff might in terms have asked for possession of the office he said was his".

but he asked

> "how would practical effect be given to an award of possession of office otherwise than by preventing interference with the rights of which it was made up".

Even so, having reversed the decree passed by the Courts below, when the High Court remanded the case for retrial, the plaintiff was advised to amend his plaint and to define more precisely the terms of the injunction he sought. It is urged that, in the present appeals also, by asking for a declaration of their rights and for an appropriate injunction against the respondent the appellants were in effect asking for possession of the hereditary office. It is doubtful if the claims made by the appellants in their respective suits are exactly analogous to the claim made by the plainiff in *Kunj Bihari Prasad's case*[1]. The appellants have not only asked for an injunction but also for an account of the income received by the trustees from July 23, 1933, up to the date of the suit as well as for similar account from the date of the suit until the date of the decree. A claim for accounts in the form in which it is made may not be quite consistent with the appellants' contention that their suits are for nothing more than possession of the hereditary office; but in dealing with the present appeals we are prepared to assume that they have in substance claimed possession of the office. The question which then arises is; Does this claim for possession attract the application of Article 124 of the Limitation Act?

Article 124 governs suits for possession of an hereditary office. The period of limitation prescribed by the Article is twelve years and the said period begins to run when the defendant takes possession of the office adversely to the plaintiff. This is explained to mean that the hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed. It is clear that before this Article can apply it must be shown that the suit makes claim for possession of an office which is hereditary; and the claim must be made against the defendant who has taken possession of the said hereditary office adversely to the plaintiff. Unlike Article 142 the fact that the plaintiff is out of possession of the hereditary office for more than twelve years before the date of his suit would not defeat his claim for possession of the said office. What would defeat his claim is the adverse possession of the said office by the defendant for the prescribed period. As the *Explanation* makes it clear usually the receipt of the profits may amount to the possession of the office; but if the defendant merely receives the profits but does not perform the duties which are usually performed by the holder of the office, the receipt of the profits by itself may not amount to the possession of office. The cause of action for possession in suits falling under Article 124 is the wrongful dispossession of the plaintiff and the adverse possession by the defendant of the office in question. Claims for possession of hereditary offices which attract the application of this Article are usually made by holders of the said offices against persons who claim adverse possession of the said offices; in other words, in suits of this kind, the contest is usually between rival claimants to the hereditary office in question.

In the present appeals the claim for possession is made by the appellants against the trustees of the *Sansthan*. It is significant that the persons who are actually performing the duties of the worshippers are not impleaded; and they do not claim

1. (1904) I.L.R. 28 Bom. 567.

to hold office as hereditary officers either. They have been appointed by the trustees as servants of the institution and they perform the duties of worship as such servants. The trustees, on the other hand, cannot be said to have taken possession of the office themselves adversely to the appellants. They do not take the profits themselves nor do they perform the duties associated with the said office. They have, in exercise of their authority and power as trustees, dismissed the appellants' predecessors from office and have made fresh appointments of servants to perform the worship at the *Sansthan* and, in making the said appointments, have in fact destroyed the hereditary character of the office. The dispute in the present appeals is between the worshippers who claim hereditary rights and the trustees of the institution who claim to have validly terminated the services of some of the predecessors of the appellants and to have made valid appointments to the said office. It is, therefore, impossible to accept the argument that the claim made by the appellants in their respective suits attracts the provisions of Article 124. It is conceded by Mr. Rege that if Article 124 does not apply, the suits would be governed by Article 120 which is a residuary Article. It may *prima facie* appear somewhat strange that whereas a suit against a person claiming to hold the hereditary office adversely to the plaintiff is governed by a period of twelve years, a claim against the trustees like the respondents in the present appeals who have dismissed the hereditary worshippers should be governed by a period of six years. It may be possible to suggest that there is a substantial difference in the nature of the two disputes ; but apart from it, it was well known that the artificial provisions of limitation do not always satisfy the test of logic or equity.

Mr. Rege, however, argued that in determining the scope of Article 124 we need not consider the provisions of col. 3 to the said Article. His contention appears to be that once it is shown that the suit is for possession of an hereditary office, Article 124 must apply though the claim for possession may not have been made against a person who has taken possession of the office adversely to the plaintiff. He also urged alternatively that the trustees should be deemed to have taken possession of the office adversely to the appellants. We have already held that the conduct of the trustees shows that they have not taken possession of the office adversely within the meaning of col. 3 of Article 124 ; and we do not think it is possible to ignore the provision of col. 3 in deciding whether or not Article 124 applies. It is true that in *Jalim Singh Srimal* v. *Choonee Lall Johurry*[1], while holding that the adjustment on which the plaintiff's claim was based in that case was in time both under Articles 115 and 120, Jenkins C.J., has observed that the function of the third column of the Second Schedule is not to define causes of action but to fix the starting point from which the period of limitation is to be counted ; but this observation does not support the appellant's case that Article 124 would govern the suit even though the third column is wholly inapplicable to it. That obviously is not the effect of the observations made in *Jalim Singh's case*[1].

The question about the nature and scope of the provisions of Article 124 has been considered by the Madras High Court in *Thathachariar* v. *Singarachariar*[2].

"If we take into consideration the terminology used in the three columns of Article 124",

observed Srinivasa Aiyangar, J., in that case :—

"it is clear that the nature of the suit intended to be covered by that article must be a suit filed by a plaintiff who claims the office from a person who at that time holds the office himself".

In our opinion this view is correct.

We may also refer to another decision of the Madras High Court in which this question has been considered. In *Annasami* v. *Adivarahachari*[3], a Full Bench of the Madras High Court was dealing with a suit in which the plaintiff had claimed an injunction restraining the trustees and the archakas of the Sri Bhuvarahaswami temple at Srimushnam from interfering with the performance of the duties of his office of *mantrapushpam* of the temple. This suit had been filed in 1929. The office

1. (1911) 15 C.W.N. 882.
2. A.I.R 1928 Mad. 377.
3. (1940) 2 M.L.J. 990 : I.L R. (1941) Mad. 275 (F.B.).

of *mantrapushpam* was a hereditary office and the plaintiff had succeeded to it on the death of his father in 1906. The emoluments of the office consisted of a ball of cooked rice per diem and twelve annas per month. It appears that the plaintiff was a Vadagalai while the archakas of the temple were Thengalais and there was animosity between them; and as a result of this animosity the plaintiff had never been able to perform the duties of his office. It was common ground that the plaintiff was the lawful holder of the office and that he had been receiving its emoluments month by month until 1927. The archakas who resisted the plaintiff's claim did not claim that they were in possession of the office or that they had performed the duties of the said office. The Full Bench held that, where a person is admittedly the lawful holder of the office and he is enjoying its emoluments, he must in law be regarded as being in possession of the office itself, especially where no one else is performing the duties of the said office; and so under Article 124 it was enough for the plaintiff to show that he had been in receipt of the emoluments of the office to save his claim from the bar of limitation. The Full Bench also rejected the contention that under Article 120 the suit was barred because it was held that every time the trustee and the archakas prevented the plaintiff from performing his duties as a hereditary officer a fresh cause of action arose and so there can be no bar of limitation under Article 120. It would be noticed that the basis of this decision was that, in the eyes of law, the plaintiff was in possession of the hereditary office since he was receiving the emoluments of the said office month by month, and so every act of obstruction on the part of the archakas and the trustee was in the nature of a continuing wrong which gave rise to a fresh cause of action to the plaintiff from time to time. In other words, on the facts the Full Bench held that section 23 helped the plaintiff and saved his suit from the bar of limitation. As we will presently point out there is no scope for applying section 23 to the facts of the present cases, and so the decision in *Annasami Iyengar case*[1], cannot assist the appellants.

In this connection it is relevant to consider the decision of the Privy Council in *Jhalandar Thakur* v. *Jharula Das*[2], in which it was held that Article 124 was inapplicable. The defendant Jharula Das had obtained a decree for money on a mortgage which had been executed in his favour by Mst. Grihimoni, the widow of the shebait of the temple. In execution of the said decree the defendant had caused 3½as. share of the judgment-debtor including her right in the nett income of the daily offerings made before the idol to be put for sale and had himself purchased it at the auction sale. As such purchaser he was in possession of the income of the said share. The judgment-debtor attempted to challenge the said sale by two suits but her attempts failed and the auction-purchaser continued to be in possession of the income. On the death of Mst. Grihimoni, Bhaiaji Thakur, who succeeded to the office of the shebait, sued the defendant for possession of certain lands and claimed a declaration that he was entitled to receive the 3½as. share of the nett income from the offerings to the temple with other reliefs. This claim was resisted by the defendant Jharula Das. In regard to the plaintiff's claim in respect of the said 3½as. share, the High Court had held that Article 124 applied and that the claim was barred under the said Article. That is why the decree passed by the trial Court in favour of the plaintiff in respect of the said income was reversed by the High Court. This decision was challenged by the plaintiff before the Privy Council and it was urged on his behalf that Article 124 did not apply. The Privy Council upheld this contention. It was clear that the office of the shebait of the temple was a hereditary office which could not be held by anyone who was not a Brahmin Panda. Jharula Das was not a Brahmin Panda. He was of an inferior caste and was not competent to hold the office of the shebait of the temple, or to provide for the performance of the duties of that office. On these facts the Privy Council held that the appropriation from time to time by Jharula Das of the income derivable from the said 3½as. share did not deprive Mst. Grihimoni, and after her death, Bhaiaji Thakur, of the possession of the office of the shebait although that income was receivable by

1. (1940) 2 M.L.J. 990: I.L.R. (1941) Mad. 275.

2. (1914) I.L.R. 42 Cal. 244 : L.R. 41 I.A. 267 : 27 M.L.J. 100.

them in right of the shebaitship. The basis of this decision is that, on each occasion on which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, he committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait ; but it did not constitute him a shebait for the time being or affect in any way the title of the office. Thus this decision emphasises that for the application of Article 124 it is essential that the defendant to the suit must be in adverse possession of the hereditary office in question. We must, therefore, hold that Article 124 does not apply to the suits filed by the appellants ; and as we have already observed, if Article 124 does not apply, Article 120 does.

The next point which arises for our decision is whether under Article 120 the suits are barred by limitation. Under Article 120 time begins to run against the plaintiffs when the right to sue accrued to them, and that naturally poses the question as to when the right to sue accrued to the appellants ? In deciding this question it would be necessary to recall briefly the material facts in regard to the past disputes between the appellants and the trustees. These disputes began in 1911. On January 31, 1911, the trustees wrote a yadi (memorandum) to the Collector of Poona asking his permission to dismiss eleven guravs from service. They set out in detail several items of misconduct of which the said guravs were guilty ; and they expressed their opinion that for the proper management of the affairs of the institution it was necessary to terminate the services of the offending guravs (Exhibit 407). On April 1, 1911, the Collector sent a reply to the trustees and told them that, as a result of the Government Resolution No. 4712 passed on November 29, 1864, it was unnecessary for the trustees to obtain the Collector's sanction because it was competent to the trustees to settle their own affairs without any such sanction. The trustees then met in a committee on September 18, 1911, and decided to dismiss from service the said eleven guravs. In its resolution the committee stated that the guravs were violent and arrogant and it was likely that they may commit riot at the time when the committee would seek to take charge from them. The committee also apprehended that the rest of the guravs would make a common cause with those who had been dismissed from service and would refuse to serve the *Sansthan*. Even so the committee decided to appoint six Brahmins temporarily to perform the service, because the committee was prepared to allow the rest of the guravs to render service to the *Sansthan* if they were ready to act according to the orders of the committee and were willing to enter into a formal agreement in that behalf. In accordance with this resolution the committee served notice on the eleven guravs on October 13, 1911, terminating their services and calling upon them to hand over to the committee all articles in their charge and forbidding them from entering the temple in their capacity as servants. Notice was likewise served on the rest of the guravs calling upon them to agree to serve the *Sansthan* on conditions specified in the notice. These terms were not acceptable to the guravs and so, on behalf of two guravs Eknath and his brother Ramchandra, notice was served on the trustees on October 26, 1911, complaining against the trustees' conduct in forcibly removing the guravs from the temple and thereby wrongfully denying their rights. The notice warned the trustees that unless they retraced their steps and gave possession to the guravs as claimed in the notice legal steps would be taken against them.

This notice was followed by the guravs' suit No. 485 of 1911. In the suit the plaintiffs claimed declaration about their rights of ownership and asked for consequential reliefs. This claim was denied by the trustees who claimed the right to dismiss the guravs. It was alleged on their behalf that some of the plaintiffs had been dismissed and others had resigned their employments and so all of them had lost their rights. This suit was seriously contested but in the end the guravs lost and their suit was dismissed on January 31, 1918.

The guravs then preferred appeals in the High Court but these appeals were also dismissed on August 3, 1921. We have already pointed out that, while dismissing the said appeals, the High Court made certain observations about the guravs' hereditary rights of worship and suggested that these rights could be adjudi-

cated upon in a suit filed under section 92 of the Code. Thus at the time when the guravs' appeals were dismissed the position was that the claim of ownership set up by them had been rejected ; but the question as to whether they were entitled to the lesser rights of hereditary worshippers was left open.

The guravs then obtained forcible possession of the temple and that led to the trustees' suit under section 9 of the Specific Relief Act, No. 1075 of 1922, on September 12, 1922. In this suit the trustees specifically alleged that the relationship of the defendants as servants of the *Sansthan* had ceased as from September, 1911, and they averred that the defendants had therefore no right to obtain possession of the temple. The defendants no doubt disputed this claim and pleaded that they were the hereditary vatandar pujari servants but their claim was negatived and a decree for possession was passed on November 4, 1922. In execution of this decree the defendants were dispossessed.

On these facts the High Court has held in favour of the appellants, and rightly we think, that it was difficult to accept the respondents' contention that the cause of action for the present suits which were expressly based upon the status of the guravs as hereditary servants arose in 1911. But, the High Court felt no doubt that the cause of action to file the present suits had accrued either on September 12, 1922, when the trustees filed their suit under section 9 of the Specific Relief Act or in any event on November 4, 1922, when the said suit was decreed and the guravs were consequently dispossessed. In our opinion this conclusion is also right. One of the guravs who was examined in the present litigation has stated that:

> " If in any year when it is the turn of any takshim to serve, if a person outside the gurav family is appointed by the trustees, all the takshims have a right to object ".

There is also no dispute that since the dismissal of eleven guravs in 1911 till the institution of the present suits none from the gurav family has served the temple except for 3½ months in 1922 when the guravs had wrongfully obtained possession of the temple. In 1922, the guravs knew that their claim of ownership had been rejected and that the only right which they could set up was as hereditary worshippers of the temple and not its owners. This right was specifically denied by the trustees in their plaint while it was specifically set up in defence by the guravs in their written statement ; and the decree that followed upheld the trustees' case and rejected the defendants' claim. On these facts the conclusion is irresistible that the right to sue accrued to the guravs at the latest on November 4, 1922, when a decree was passed under section 9 of the Specific Relief Act. If not the plaint in the suit, at least the decree that followed clearly and effectively threatened the guravs' rights as hereditary worshippers and so the cause of action to sue on the strength of the said rights clearly and unambiguously arose at that time. If that be the true position it follows that the present suits which have been filed long after the expiration of six years from 1922 are barred by time under Article 120.

It is then contended by Mr. Rege that the suits cannot be held to be barred under Article 120 because section 23 of the Limitation Act applies ; and since, in the words of the said section, the conduct of the trustees amounted to a continuing wrong, a fresh period of limitation began to run at every moment of time during which the said wrong continued. Does the conduct of the trustees amount to a continuing wrong under section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise *de die in diem* as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that section 23 refers not to a continuing right but to continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which

can be properly characterised as continuing wrongs that section 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the guravs as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action *de die in diem*. We think there can be no doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of section 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it.

We would now like to refer to some of the decisions which were cited before us on this point. The first case which is usually considered in dealing with the application of section 23 is the decision of the Privy Council in *Maharani Rajroop Koer* v. *Syed Abdul Hossein*[1]. In order to appreciate this decision it is necessary to refer, though briefly, to the material facts. The plaintiff had succeeded in establishing his right to the pyne or an artificial watercourse and to the use of the water flowing through it except that which flowed through the branch channel; he had, however, failed to prove his right to the water in the tal except to the overflow after the defendants as owners of mouzah Morahad used the water for the purpose of irrigating their own land. It was found that all the obstructions by the defendants were unauthorised and in fact the plaintiff had succeeded in the Courts below in respect of all the obstructions except two which were numbered No. 3 and No. 10. No. 3 was a khund or channel cut in the side of the pyne at a point below the bridge whereas No. 10 was a dhonga also below the bridge and it consisted of hollow palm-trees so placed as to draw off water in the pyne for the purpose of irrigating the defendants' lands. It was in regard to these two obstructions that the question about the continuing wrong fell to be considered; and the Privy Council held that the said obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisance as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. That is why the Privy Council allowed the plaintiff's claim in respect of these two obstructions and reversed the decree passed by the High Court in that behalf. In fact the conduct of the defendant showed that whenever he drew off water through the said diversions he was in fact stealing plaintiffs' water and thereby committing fresh wrong every time. Thus this is clearly not a case of exclusion or ouster.

Similarly, in *Hukum Chand* v. *Maharaj Bahadur Singh*[2], the Privy Council was dealing with a case where the defendants' act clearly amounted to a continuing wrong and helped the plaintiff in getting the benefit of section 23. The relevant dispute in that case arose because alterations had been made by the Swetambaris in the character of the charans in certain shrines and the Digambaris complained that the said alterations amounted to an interference with their rights. It had been found by the Courts in India that the charans in the old shrines were the impressions of the footprints of the saints each bearing a lotus mark.

"The Swetambaris who preferred to worship the feet themselves have evolved another form of charan not very easy so describe accurately in the absence of models or photographs which shows toenails and must be taken to be a representation of part of the foot. This the Digambaris refused to worship as being a representation of a detached part of the human body".

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1. (1880) L.R. 7 I.A. 240.

2. (1933) 65 M.L.J. 163 : L.R. 60 I.A. 313.

The Courts had also held that the action of the Swetambaris in placing the charans of the said description in three of the shrines was a wrong which the Digambaris were entitled to complain. The question which the Privy Council had to be consider was whether the action of the Swetambaris in placing the said charans in three of the shrines was a continuing wrong or not; and in answering this question in favour of the plaintiffs the Privy Council referred to its earlier decision in the case of *Maharani Rajroop Koer*[1], and held that the action in question was a continuing wrong. There is no doubt that the impugned action did not amount to ouster or complete dispossession of the plaintiffs. It was action which was of the character of a continuing wrong and as such it gave rise to a cause of action *de die in diem*. In our opinion, neither of these two decisions can be of any assistance to the appellants.

On the other hand the decision of the Patna High Court in *Choudhury Bibhuti Narayan Singh* v. *Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*[2], as well as that of the Full Bench of the Punjab High Court in *Khair Mohammad Khan* v. *Mst. Jannat*[3] support the respondents contention that where the impugned act amounts to ouster there is no scope for the application of section 23 of the Limitation Act. We are, therefore, satisfied that there is no substance in the appellants' contention that section 23 helps to save limitation for their suits.

The result no doubt is unfortunate. The appellants have succeeded in both the Courts below in proving their rights as hereditary worshippers; but their claim must be rejected on the ground that they have filed their suits beyond time. In this Court an attempt was made by the parties to see if this long drawn out litigation could be brought to an end on reasonable terms agreed to by them, but it did not succeed. In the result the appeals fail and are dismissed. We would, however, direct that the parties should bear their own costs throughout.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—K. C. DAS GUPTA AND J. C. SHAH, JJ.

Dhannjay Ram Sharma, son of P. T. Shimbhu Dayal, Ticket Collector, Northern Ry., resident of 1429, Maliwara, Delhi-6 .. *Appellant**

v.

M. S. Uppadhaya (Mohun Sarup Uppadhaya), Special Ticket Examiner, Headquarters Office, Northern Ry., Baroda House, New Delhi and others .. *Respondents.*

Criminal Procedure Code (V of 1898), section 197—Applicability—Railway servants acting as witnesses to a search of complainant's house by Special Police Establishment—Theft or misappropriation of complainant's property and wrongful confinement during such search by such witnesses—Charge of—Sanction under section 197, if necessary.

Persons (Railway servants) who were public servants by reason of certain duties they had to perform in the Railway, as such public servants had *prima facie* nothing to do with witnessing any search or helping any police officer in the matter of searches.

Even if it was assumed for arguments sake that witnessing the search in the complainant's house could be said to be in performance of their official duty, how can it be seriously said that the principal offences, charged, *viz.*, theft or misappropriation of properties belonging to the complainant and wrongful confinement have any direct connection with the act of witnessing of the search? The mere fact that an opportunity to commit an offence is furnished by the official duty is not such a connection of the offence with the performance of such duty as to justify even remotely the view that the acts complained of are within the scope of their official duty. Accordingly sanction under section 197, Criminal Procedure Code, is not necessary for a complaint for such offences.

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1. (1880) L.R. 7 I.A. 240.
2. (1939) I.L.R. 19 Pat. 208.
3. (1940) I.L.R. 22 Lah. 22 (F.B.).

*Crl. A. No. 229 of 1959. 11th March, 1960.

Appeal against the Order, dated 17th September, 1958, of the Punjab High Court (Circuit Bench) at Delhi, in Criminal Revision No. 220-D of 1957.

Dhannjay Ram Sharma, Appellant in person.

H. J. Umrigar and *T. M. Sen,* for Respondents.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal raises a question as regards the application of section 197 of the Code of Criminal Procedure. The appellant, formerly a Ticket Collector in Northern Railway made a complaint on October 22, 1956, in the Court of First Class Magistrate, Delhi, against the three respondents, who are in the employment of the Northern Railway. The allegations in the complaint were that on September 30, 1956, at about 8-30 P.M. these accused persons along with some police officials raided the complainant's house, unlawfully confined him in a room and removed Rs. 600 in cash (silver coins) and gold jewellery worth Rs. 1,600, *i.e.,* 16 tolas from a trunk lying in the " Baithak " of the house, that they did not enter these in any recovery memo. and misappropriated the same, that they also removed some shirts and other clothing from another trunk belonging to the complainant, that the accused Uppadhaya took complainant's Gita Diary containing Rs. 36 currency notes and misappropriated the same and that the cash and jewellery were kept in a bag by all the accused and was given to accused Uppadhaya. It was further alleged that the accused Uppadhaya also searched the shop of complainant's father and misappropriated Rs. 18 from his pocket and four packets of Captain's Cigarettes and one match box.

According to the petition of complaint the accused persons had committed offences under section 461 read with sections 379, 403, 342, 166 and 167 of the Indian Penal Code. The Magistrate issued process against the three accused persons for offences under sections 403, 379, 342 and 166 of the Indian Penal Code.

Three witnesses were examined before the Magistrate on behalf of the accused to establish their claim that sanction under section 197 of the Criminal Procedure Code was necessary. On a consideration of their evidence and also a copy of a memorandum issued by the Government of India, Ministry of Home Affairs, the Magistrate came to the conclusion that section 197 of the Code of Criminal Procedure applied and in that view dismissed the complaint because no sanction of the Central Government had been obtained.

The Additional Sessions Judge, Delhi, was moved against this order of dismissal but he too was of the same view and refused to interfere with the Magistrate's order.

The High Court of Punjab was then moved. That Court was also of opinion that as regards some of the offences at least sanction under section 197, Criminal Procedure Code, was necessary, but as the other offences were inextricably mixed up with the offences for which sanction was required the learned Judge of the High Court refused to interfere with the order dismissing the complaint.

Thereafter the appellant applied for and obtained Special Leave to appeal from this Court. That is how the appeal has come up for hearing and final disposal before us.

Before the protection of section 197, Criminal Procedure Code, can be claimed by an accused person he has in the first instance to satisfy the Court that he is a public servant " not removable from his office save by or with the sanction of a State Government or the Central Government ", and next that the acts complained of, if committed by him were committed " while acting or purporting to act in the discharge of his official duty ". No dispute was raised in the Courts below as regards the first question, *viz.,* whether these accused persons were public servants not removable except with the sanction of the Central Government and we have to proceed here on the basis that this requirement has been satisfied. The important question that still remains is whether the accused can reasonably claim that the acts complained of were committed by them in the discharge of their public duties or while purporting to act in discharge of their public duty.

The scope of section 197, Criminal Procedure Code, has been considered by the Privy Council and this Court in numerous cases. As was laid down by the Privy Council in *Gill's case*[1]:

"A public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as to lie within the scope of his official duty".........................."The test may well be"

their Lordships further observed

"whether the public servant if challenged, can reasonably claim that, what he does, he does in virtue of his office."

A somewhat wider field for the application of section 197 was indicated in this Court's decision in *Amrik Singh* v. *The State of Pepsu*[2], when it was stated that the test to apply is whether acts with which the accused is charged directly bear on the duties which he has got to discharge as a public servant.

In our opinion it is clear that even if the wider test indicated in *Amrik Singh's case*[2], is applied the acts of the accused persons in the present case do not come within the protection of section 197, Criminal Procedure Code. In the first place it has to be noticed that the accused persons were public servants by reason of certain duties they had to perform in the Railway. Their duties as such public servants had *prima facie* nothing to do with witnessing any search or helping any police officer in the matter of searches. But it is urged that the Home Office memorandum imposed on these persons the additional duty of witnessing a search at the request of police officers. All that the Home Office memorandum does is to provide that a request may be made to the different ministries of the Government —including the Ministry of Transport, and we shall assume

"that when the Special Police Establishment will make a request to the Ministry to depute one of their officer or officers to witness a trap case, that Ministry might extend their co-operation in the matter."

The position therefore is that if and when the Special Police Establishment had made a request to the Ministry which administers the Northern Railway and the competent officers of the Ministry directed these officers to go and witness a trap case, there would have been scope for an argument that when such an officer went to witness a trap case, he was performing his official duty. Admittedly however there was in the present case no request by the Special Police Establishment to anybody in authority in the Ministry of Transport which administers the Railway. What appears to have happened was that the Deputy Superintendent of Police Establishment, Shri Roshan Lal Khanna, himself called the accused without any reference whatever to the superior officers of these accused persons. Therefore when the accused went to witness the search they did so not in pursuance of the Home Office memorandum and so could not possibly be said to be performing their official duty or purporting to act in the performance of their official duty. It is important to note also that the Home Office memorandum speaks only of the deputation of officers "to witness a trap case". Clearly however search and seizure of property in the complainant's house was not in a "trap case". There is therefore no escape from the conclusion that the alleged presence of the accused persons in the complainant's house on September 30, 1956, had nothing to do with the performance of their official duties. Neither were the accused persons performing any official duty in going to that house or doing anything there nor were they purporting to do so.

In the second place it has to be noticed that even if it was assumed for the argument's sake that witnessing the search in complainant's house could be said to be in performance of their official duty we fail to understand how it could be seriously suggested that the principal offence charged, *viz.*, theft or misappropriation of properties belonging to the complainant and wrongful confinement could be said to have any direct connection with the act of witnessing the search. Their presence there as witnesses to the search of complainant's house obviously would give them

1. (1948) 2 M.L.J. 6 : L.R. 75 I.A. 41 : A.I.R. 1948 P.C. 128 (P.C.).
2. (1955) 1 M.L.J. (S.C.) 198: (1955) S.C.J. 334 : (1955) 1 S.C.R. 1302: A.I.R. 1955 S.C. 309.

the opportunity of committing the offence complained of. The mere fact that an opportunity to commit an offence is furnished by the official duty is not such a connection of the offence with the performance of such duty as to justify even remotely the view that the acts complained of are within the scope of their official duty.

Our conclusion therefore is that the Courts below have erred in thinking that sanction under section 197, Criminal Procedure Code, was necessary in this case. We therefore allow the appeal, set aside the order of dismissal made by the learned Magistrate and order that the case be disposed of by him in accordance with law.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

The Commissioner of Income-tax, Bombay North .. *Appellant**

v.

Chandulal Keshavlal & Co., Petlad. .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Managing agent; the assessee—Part of accrued commission waived in the interest of the managed Company—If deductible allowance.

The managing agent of a company—a partnership firm—agreed at the request of the Board of Directors of the managed company, to receive only Rs. 1,00,000 as its commission and waive the balance of accrued commission Rs. 2,09,114 (this is borne out by the entries in the books). The Income-tax Officer and Appellate Assistant Commissioner held that the whole of the accrued commission was taxable.

On appeal the Appellate Tribunal held that the assessee accepted only Rs. 1,00,000 as taxable income and Rs. 2,09,114 was held to be an allowable expenditure within the section 10 (2) (*xv*) of the Act (XI of 1922). On a reference under section 66 (1) of the Act the High Court, held that the findings of the Tribunal, that the waiving of a portion by the managing agent of the accrued commission benefiting the company did also benefit the managing agent thereby and that it was not a bounty to the company but was for reasons of commercial expediency are *findings of fact* and unless it is proved to be based on no evidence, the Court was concluded by the said finding and answered the reference in favour of the assessee.

On appeal from that decision to the Supreme Court :

Held :—(1) It is a question of fact in each case, whether the amount claimed as deductible allowance under section 10 (2) (*xv*) of Act (XI of 1922) was "laid out wholly and exclusively for the purpose of business" and if the fact-finding Tribunal comes to such a conclusion on evidence justifying the same, then it will become an admissible deduction. The decision of such questions is for the Appellate Tribunal and the decision must be sustained if there is evidence on which the Tribunal could have arrived at such a conclusion.

If the expense is incurred for fostering the business of another only or was made by way of distribution of profits or was wholly gratuitous or for some improper and oblique purpose outside the scope of business of the assessee then the expense is not deductible. In deciding whether a payment of money is a deductible expenditure one has to take into consideration questions of commercial expediency and principles of ordinary trading. If the payment or expenditure is incurred for the trade of the assessee it does not matter that the payment may enure to the benefit of a third party. Another test is whether the transaction is properly entered into as part of the assessee's legitimate commercial undertaking in order to facilitate his carrying on of business ; it is immaterial if a third party also benefits thereby.

In the instant case (*vide* statement of facts) the sum of Rs. 2,09,114 was given up for reasons of commercial expediency, not as a bounty, but would result in a benefit to the assessee, and that is a question of fact. On that finding the Appellate Tribunal was correct in holding it to be deductible expense under section 10 (2) (*xv*).

Appeal by Special Leave from the Judgment and Order, dated the 15th February, 1955, of the Bombay High Court in Income-tax Reference No. 29 of 1953.

C. K. Daphtary, Solicitor-General of India (*R. Ganapathi Iyer* and *D. Gupta*, Advocates, with him), for Appellant.

N. A. Palkhivala and *I. N. Shroff*, Advocates, for Respondent.

* Civil Appeal No. 167 of 1958. 17th February, 1960.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by Special Leave against the judgment and order of the High Court of Bombay. It arises out of a reference by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (hereinafter termed the Act.) The appellant in this appeal is the Commissioner of Income-tax and the respondent is a partnership firm which, by an agreement, dated September 23, 1935, was appointed the Managing Agent of the Keshav Mills Ltd., Petlad. For the sake of convenience the respondent firm will, in this judgment, be termed the Managing Agent and the Keshav Mills, Ltd., the Managed Company. By clause 4 of this agreement the Managing Agent was to get a commission of 4 per cent. on the sale proceeds of the cloth, yarn or other goods manufactured and sold by the company and 15 per cent. on the amount of bills for charges of ginning and pressing and dyeing or bleaching and on the amount of labour bills and other work done in the running of the factory. The commission was exclusive of other charges such as *adat*, interest, discount, brokerage, etc. The amount of commission was to be credited in the account of the Managing Agent every six months and it was entitled to interest at the rate of six per cent. per annum on the amount so credited. There were other conditions in the Agency Agreement which are not necessary for the purposes of this case. The total commission for the accounting year 1950 was a sum of Rs. 3,09,114. Sometime during the accounting year, at the oral request of the Board of Directors of the Managed Company, the Managing Agent agreed to accept a sum of Rs. 1,00,000 only as its commission which was credited to the account of the Managing Agent in the books of the company at the end of the year 1950. The Income-tax Officer and the Appellate Assistant Commissioner held that the amount which accrued as commission to the Managing Agent was Rs. 3,09,114 and that amount was taxable. An appeal was taken to the Income-tax Appellate Tribunal by the Managing Agent. By an order dated February 26, 1953, the Appellate Tribunal held that the amount which accrued to the Managing Agent as commission was Rs. 3,09,114 but it accepted Rs. 1,00,000 as taxable income and Rs. 2,09,114 was held to be an allowable expenditure within section 10 (2) (*xv*) of the Act and it was therefore allowed. The Tribunal in its order said that in the past also the Managing Agent had, in the interest of the Managed Company, waived a portion of the commission and then made the following observation :

"The Tribunal has also held that if the managing agency commission or a part thereof is foregone in the interest of the Managed Company, it would be allowed as an expenditure under section 10 (2) (*xv*) of the Act. We allow the amount foregone under Section 10 (2) (*xv*)."

Against this order, at the instance of the appellant, a case was stated to the Bombay High Court for its opinion on the following two questions :

(i) Whether on the facts and in the circumstances of the case, the sum of Rs. 2,09,114 was assessable in the hands of the assessee as its income.

(ii) If the answer to question (i) is in the affirmative whether the said sum is an allowable deduction from the assessee's income under section 10 (2) (*xv*) of the Act.

The judgment of the High Court shows that it was inclined to decide the questions in favour of the appellant, but at the instance of the Managing Agent the Appellate Tribunal was directed to submit a Supplementary Statement.

No fresh evidence was led before the Tribunal but it appears that some emphasis was laid on a letter of the Managing Agent, dated September 18, 1951, sent to the Income-tax Officer. In this letter the Managing Agent had stated that the only commission which accrued to it was a sum of Rs. 1,00,000 and nothing had been foregone from out of the commission so relinquished. It is also stated that the amount of Rs. 1,00,000 accrued because of the variation of the terms of the Managing Agency Agreement. Reference was also made in the letter to the Balance Sheet of the Managed Company ending December 31, 1950, showing that the paid-up capital was rupees 30 lacs, depreciation fund rupees 14 lacs, totalling rupees 44 lacs. As against this sum the Block Account showed a debit of over rupees 48 lacs and it was with the object of strengthening the financial position of the Managed Company and in its interest that the Chairman of the Board of Directors had

requested and the Managing Agent had agreed to accept rupees 1 lac as commission. The Income-tax Appellate Tribunal submitted a supplementary statement of case, dated May 3, 1954, in which it said (1) that there was no oblique motive in accepting Rs. 1,00,000 instead of rupees 3 lacs odd as commission and that the remission was *bona fide*. It was also remarked that it was not even faintly suggested by the Department that what was given up by the Managing Agent from the commission was done with some dishonest motive; (2) the amount foregone by the Managing Agent was an expenditure incurred wholly and exclusively for the purpose of the business of the Managing Agent; (3) that when the appeal was decided by the Appellate Tribunal it did not have the slightest doubt in its mind that the commission was foregone for business considerations; and (4) that the amount was given up or expended for reasons of commercial expediency. A very significant paragraph in the Supplementary Statement of the Case was paragraph 4 which stated :

> "It was assumed that what was in the interest of the managed company was in the interest of the managing agent. The interest of the managing agent and the managed company are, so to say, linked up. If the managed company is put on a sounder position, not only the shareholders of the managed company benefit, but also the managing agent, inasmuch as the managing agent would get a larger commission in future."

The basic facts which arise out of the Statement of the Case and the documents which were produced by the Managing Agent are: (1) the rather unsatisfactory financial position of the managed company as shown by the Balance-Sheet; (2) in the past also the Managing Agent had been remitting a part or whole of the commission whenever the profits of the Managed company were unsatisfactory; (3) in the year of account the profits of the managed company as per profit and loss account were Rs. 5,72,192. This was after paying to the Managing Agent a commission of Rs. 1,00,000 and if whole of the accrued commission had been deducted then the profits would have been Rs. 3,63,078 which would be the lowest amount since 1940 and the amount of commission would have been the highest; (4) it was not a bounty by the Managing Agent to the Managed Company; (5) the business of the Managing Agent was so linked up with the Managed Company that if the latter was put on a sounder position the Managing Agent would also get a larger commission in future; and (6) the Managing Agent had accepted Rs. 1,00,000 at the instance of the Chairman of the Board of Directors of the Managed company. This was the material on which the Tribunal gave a finding in its Supplementary Statement 'that what was given up by the assessee was an expenditure for the purpose of the assessee's business'. On this statement the High Court by its judgment, dated February 15, 1955, held the finding of the Appellate Tribunal to be one of fact. It said :

> "Now this is a finding of fact and unless it can be suggested that there was no evidence to support the finding of fact we are concluded by this finding of fact".

Therefore the question in regard to section 10 (2) (*xv*) was answered in favour of the Managing Agent. It is against this judgment and order that the appellant has come in appeal to this Court by Special Leave.

For the appellant it was argued that there was no evidence in support of the finding that the amount of about rupees 2 lacs which was foregone by the Managing Agent, was wholly and exclusively laid out for the purpose of the Managing Agent's business and emphasis was laid on the finding of the Appellate Tribunal in its order, dated February 26, 1953, that in the past the commission had been given up by the Managing Agency in the interest of the Managed Company and that if the Managing Agent's commission or part thereof was foregone in the interest of the Managed Company it was not an allowable expenditure under section 10 (2) (*xv*). It was also argued that there was no evidence in support of the finding that the amount was expended for the benefit of the Managing Agent and that even if as a result of the amount being foregone the Managing Agent was helped because it benefited the Managed Company, then section 10 (2) (*xv*) would not be attracted; in other words, the question had to be looked at from the point of view of the direct concern of the Managing Agent and not of remoter or indirect result which may flow as a result of the benefit to the Managed Company and in each case

the question on each set of facts is whether the benefit is to the assessee, *i.e.*, the Managing Agent or to someone else.

In his argument the learned Solicitor-General referred to the following cases:

Tata Sons, Ltd. v. *The Commissioner of Income-tax, Bombay*[1]. There the assessee was the Managing Agent of another company and was entitled to receive commission on the net profits of the Managed Company. During the relevant year the assessee voluntarily paid a sum of money towards the bonus which the Managed Company paid to some of its officers and claimed it as a deductible expenditure under section 10 (2) (*xv*) of the Act. This deduction was allowed on the ground that the object of the payment from the point of view of commercial principles was to increase the profits of the Managed Company and thereby the commission of the Managing Agent. It was argued there also that the payment was entirely gratuitous but that contention was repelled, because the object of the payment from the point of view of commercial principles was to increase the efficiency of the Managed Company and thereby to increase the profits of the Managed Company and the commission of the Managing Agent. And thus there was an important nexus between the Managed Company and the Managing Agent. It was also held that the question whether money was wholly expended or laid out for the purpose of the business of the assessee company must be determined upon principles of ordinary commercial trading.

The second case was *Union Cold Storage Company, Ltd.* v. *Jones*[2]. There a British company transferred its foreign cold storage business carried on by it directly or through subsidiary companies to an American Company for a term of years in consideration of certain annual payment to the subsidiary companies and of a guarantee of any sum necessary to meet its fixed charges and maintain its dividends. The property remained the property of the British Company but it was placed under the sole control of and was used by the American Company for its own business. There was no demise or lease to the American Company and no rent was payable but the American Company was to keep it in proper repair and working order. The British company paid for fire insurance premiums in respect of the premises—machinery, etc., and claimed deductions for the sums so paid out of its profits and for wear and tear of the machinery and plant of the transferred business. It was held that the insurance premiums did not represent money wholly and exclusively laid out for the purpose of trade of the assessee company as the machinery and plant were not used for those purposes and the deductions claimed were therefore not admissible. It was argued in that case that by the agreement the assessee company had secured not only the right to receive upto the sum specified but also that the American company would have an incentive to send business to the assessee company in order that its profits should reach that specified figure and therefore the expenditure was deductible. But it was held that in order to be so deductible it had to be for the benefit of the trade which immediately concerned the assessee company. Its wa also held that if it was of such a nature then the deduction was *prima facie* a proper one even though it might inure to the benefit of a third party and the matter had to be tested from the point of view of the assessee company.

The learned Solicitor-General relied upon a passage in the judgment at page 741 :

". . . . . they (the Commissioners) find that there was a reflex result of this Agreement which inured to the benefit of the Appellant Company but I think in terms they indicate that that result was not a direct result but a reflex result. In their reasons in which they came to their conclusion they say the arrangements with regard to the stores and machinery and plant were not of an ordinary nature and they did not extend the Appellant Company's market. They also say that the machinery and plant in question is used primarily for the purposes of the trade of the National Company. With those findings before us I think it is quite clear as a matter of fact that the facts so found differentiate this case wholly from *Usher's case*."[3]

From this it was sought to be argued that what one is to look at is the direct result to the assessee and not remoter or indirect results. What the Court found in

1. (1950) 18 I.T.R. 450.
2. 8 Tax Cas. 725.
3. 6 Tax Cas. 399.

that case was that insurance premiums were paid by the British Company as owners and not in the course of business and that the assets were used not for its business but for the business of another. The real test laid down after reference to *Usher's Wiltshire Brewery Limited* v. *Bruce*[1], was that deduction may be allowed in cases where the payment of expenditure is incurred for the purpose of the trade of the subject making the return and it does not matter that this payment may inure to the benefit of a third party.

Another case relied on was *Eastern Investments, Ltd.* v. *The Commissioner of Income-tax, West Bengal*[2], where a private limited company, had a share capital of rupees 250 lacs of which shares of the value of rupees 50 lacs were held by *A* and the remaining by his nominees. The company was in need of money and with the consent of *A* it resolved to reduce the share capital by rupees 50 lacs by the company taking over rupees 50 lacs worth of shares and issuing to *A* debentures of the face value of rupees 50 lacs carrying interest at 5 per cent. The Income-tax Appellate Tribunal and the High Court held that the interest on debentures was not an allowable expenditure under section 12 (2) of the Act. This Court, on appeal, was of the opinion that the transaction was of a commercial nature from the point of view of the asessee company and on a review of all the facts it came to the conclusion that the transaction was voluntarily entered into in order indirectly to facilitates the carrying on of the business of the company and so made on the ground of commercial expediency. The argument that the debentures were held by the shareholder was rejected on the ground that it made no difference whether the debentures were held by the shareholder or by an outsider. The test laid down by this case therefore was that in the absence of fraud or an oblique motive and if a transaction is of a nature which is entered into in the course of business of the assessee and is commercially expedient then it does become a deductible allowance. If as a result of the transaction the asessee benefits it is immaterial that a third party also benefits thereby. At page 599, Bose, J., observed:

> "In the absence of a suggestion of a fraud this is not relevant at all for giving effect to the provisions of section 12 (2) of the Income-tax Act, Most commercial transactions are entered into for the mutual benfit of both sides, or at any rate each side hopes to gain something for itself. The test for present purposes is not whether the other party benefited, nor indeed whether this was a prudent transaction which resulted in ultimate gain to the appellant, but whether it was properly entered into as a part of the appellant's legitimate commercial undertaking in order indirectly to facilitate the carrying on of its business."

In *Odhams Press, Ltd.* v. *Cook*[3], the assessee company had acquired all the shares in a subsidiary company and printed and published a periodical for the subsidiary company. The subsidiary company made a loss during the accounting year and the assessee company wrote off that amount of loss from the amounts due to it from the subsidiary company and claimed a deduction of that loss from its profits on trading account or as money laid out or expended for the purpose of its trade. The Special Commissioners found that the sum was not written off wholly or exclusively for the purpose of their trade or business and therefore it was an inadmissible deduction. This question was held to be one of fact and that there was evidence to justify that conclusion. Viscount Caldecote, L.C., said that the trade or the business, of one Company even though it may affect very closely the trade or business of another was not the same thing as that other's trade or business. In computing the profits and gains of the assessee, it is his trade that is to be regarded. At page 110, Viscount Maugham observed:

> "My Lords, the question thus put answers itself. There were, beyond dispute, the two relationship, between the Company and the Coming Fashions Ltd., already referred to. The allowance of the £2927 5s. 8d. to Coming Fashions Ltd.. might have been 'laid out or expended for the purpose of the trade' of Coming Fashions Ltd., or to some extent for both purposes and it is plain that these facts alone were sufficient to show that there was evidence to justify the conclusion of the Commissioner that the sum written off was not written off wholly and exclusively for the purpose of the trade or business of the Appellants."

The connection between the assessee company and the subsidiary company, apart from the holding of shares, was that the assessee company did printing for

1. 6 Tax Cas. 399.
2. (1951) S.C.J. 420 : (1951) S.C.R. 594.
3. 23 Tax Cas. 233.

the subsidiary company. The effect of the transaction was debiting of another entity's loss to the assessee company but there was no direct connection between the profits of the assessee company with that of the amount claimed. The real point in that case was that the amount was not wholly and exclusively written off for the purpose of the assessee company. Viscount Maugham said :

" Is there any real ground for contending on the evidence that one reason for writing off the sum was not to enable Coming Fashions Ltd., to continue to carry on its business as compiler and vendor of ' Everywoman's '?"

The cases we have discussed above show that it is a question of fact in each case whether the amount which is claimed as a deductible allowance under section 10 (2) (*xv*) of the Income Tax Act was laid out wholly and exclusively for the purpose of such business and if the fact-finding tribunal comes to the conclusion on evidence which would justify that conclusion it being for them to find the evidence and to give the finding then it will become an admissible deduction. The decision of such questions is for the Income-tax Appellate Tribunal and the decision must be sustained if there is evidence upon which the Tribunal could have arrived at such a conclusion.

Another fact that emerges from these cases is that if the expense is incurred for fostering the business of another only or was made by way of distribution of profits or was wholly gratuitous or for some improper or oblique purpose outside the course of business then the expense is not deductible. In deciding whether a payment of money is a deductible expediture one has to take into consideration questions of commercial expediency and the principles of ordinary commercial trading. If the payment or expenditure is incurred for the purpose of the trade of the assessee it does not matter that the payment may inure to the benefit of a third party (*Usher's Wiltshire Brewery, Ltd.* v. *Bruce*[1]. Another test is whether the transaction is properly entered into as a part of the assessee's legitimate commercial undertaking in order to facilitate the carrying on of its business ; and it is immaterial that a third party also benefits thereby : (*Eastern Investments, Ltd.* v. *The Commissioner of Income-tax, West Bengal*[2].) But in every case it is a question of fact whether the expenditure was expended wholly and exclusively for the purpose of trade or business of the assessee. In the present case the finding is that it was laid out for the purpose of the assessee's business and there is evidence to support this finding. Mr. Palkhivala referred in this connection to *Atherton* v. *British Insulated & Helsby Cables, Ltd.*[3], where at page 191, Viscount Cave, L.C., observed :

" It was made clear in the above-cited cases of *Usher's Wiltshire Brewery* v. *Bruce*[1] and *Smith* v. *Incorporated Council of Law Reporting*[4] that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purpose of the trade ; and it appears to me that the findings of the Commissioners in the present case bring the payment in question within that dercription. They found (in words which I have already quoted) that the payment was made foı the sound commercial purpose of enabling the Company to retain the services of existing and future members of their staff and of increasing the efficiency of the staff ; and after referring to the contention of the Crown that the sum of £31,784 was not money wholly and exclusively laid out for the purposes of the trade under the Rule above referred to, they found that the deduction was admissible—thus in effect, although not in terms, negativng the Crown's contention. I think that there was ample material to support the findings of the Commissioners, and accordingly that this prohibition does not apply."

Thus in cases like the present one in order to justify deduction the sum must be given up for reasons of commercial expediency ; it may be voluntary, but so long as it is incurred for the assessee's benefit the deduction would be claimable.

The Income-tax Appellate Tribunal has found in favour of the Managing Agent that the amount was expended for reasons of commercial expediency, it was not given as a bounty but to strengthen the Managed Company and if the financial position of the Managed Company became strong the Managing Agent would benefit thereby. That finding is one of fact. On that finding the Income-tax Appellate

1. 6 Tax Cas. 399.
2. (1951) S.C.J. 420 : (1951) S.C.R. 594.
3. 10 Tax Cas. 155.
4. 6 Tax Cas. 477.

Tribunal rightly came to the conclusion that it was a deductible expense under section 10 (2) (*xv*).

In our opinion, the judgment of the High Court was right and we would dismiss this appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.

The Associated Cement Company, Ltd. .. *Appellant**

v.

Shri P. D. Vyas and others .. *Respondents.*

Industrial Employment (Standing Orders) Act (XX of 1946), sections 3, 4, 5 and 15—Draft Standing Orders to be submitted to the certifying officer—Tests to treat the Standing Orders certifiable—Conformity with the model standing orders prescribed in the rules under the Act—Jurisdiction of the certifying authority to modify the draft orders.

Section 15 (2) (*b*) of Act XX of 1946 provides that the rules which the appropriate Government may make under the Act may set out model standing orders for the purposes of the Act. Section 3 requires the employer to submit draft standing orders and sub-section (2) of section 3 provides that in the draft so submitted provision shall be made for every matter set out in the Schedule which may be applicable to the establishment and where model standing orders have been prescribed shall be, as far *as is practicable*; in conformity with such model. Under section 4 the Draft Standing Orders are certifiable if it complies with the provisions in section 3 and also prior to amendment in 1956 that it is not the function of the certifying officer or the appellate authority to adjudicate upon the fairness or reasonableness thereof; but after amendment in 1956, it can also be gone into.

It is common ground that model standing orders have been prescribed in the instant case and the effect of section 3 (2) is that unless it is shown that it is impracticable to do so, the appellants' draft has to conform to the model. Respondents 1 and 2 have held that it was practicable to insist on confirmity with the model standing orders in regard to the topics in dispute, and so have made the modifications complained of. Having regard to the relevant provisions set out *infra* it is difficult to accept the plea that they have exceeded their jurisdiction.

Therefore the High Court was right in holding that the authorities under the Act had acted within their jurisdiction in making the impugned modifications.

The appellants had not raised in the Bombay High Court in their writ petition the plea that on the merits the modifications are impracticable. It will not be open to them to raise it for the first time in the instant appeal.

Appeal from the Judgment and Order, dated the 2nd December, 1954, of the Bombay High Court, in Appeal No. 122 of 1954, arising out of the Judgment and Order, dated the 30th September, 1954, of the said High Court, in Civil Miscellaneous Application No. 267/X of 1954.

R. J. Colah, Advocate and *S. N. Andley*, *J. B. Dadachanji*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Appellant.

Gopal Singh and *R. H. Dhebar*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The Associated Cement Companies Ltd., Dwarka Cement Works, Dwarka and the Associated Cement Companies Ltd., Sevalia Cement Works, Sevalia (hereinafter called the appellants) own and manage several cement works throughout India including *inter alia* cement manufacturing factories at Dwarka and Sevalia called the Dwarka Cement Works and the Sevalia Cement Works respectively. In 1946 the appellants submitted to respondent 2, the Commissioner of Labour, Bombay, in his capacity as certifying officer, draft standing orders for certification under section 3 (1) of the Industrial Employment (Standing Orders) Act, 1946 (XX of 1946) (hereinafter called the Act). Respondent 2 made several alterations in the draft submitted by the appellants. The two important alterations which are the subject-matter of the present appeal were in respect of items Nos. 8

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* Civil Appeal No. 22 of 1958. 11th February, 1960.

and 16... Under item No. 8 the draft standing orders had required that notice of fourteen days shall be given in the event of discontinuance of a shift. Respondent 2 has modified it by increasing the period of notice from fourteen days to one month. This modification has been made in accordance with the model standing order on this subject. Similarly, item No. 16 (2) in the draft standing orders provided that striking work either singly or with other workers without giving fourteen days' previous notice would be treated as misconduct whereas item No. 16 (3) provided that inciting while on the premises any worker to strike work shall be treated as misconduct. These two provisions in the draft have been modified by respondent 2 and the order thus modified provides that striking work illegally either singly or with other workers or abetting, inciting, instigating or acting in furtherance of an illegal strike would be treated as misconduct. This modification also is consistent with the relevant provision in the model standing order.

Feeling aggrieved by the modifications made by respondent 2 in the draft submitted by them the appellants preferred an appeal to the Industrial Court (hereinafter called respondent 1). Respondent 1 was not impressed by the contentions raised by the appellants with the result that the modifications made by respondent 2 were confirmed and the appeal was dismissed.

Thereupon the appellants filed a writ petition, being Miscellaneous Application No. 267 of 1954, in the Bombay High Court, challenging the validity of the action of respondents 2 and 1. Mr. Justice Coyajee, who heard the said application, upheld the contention raised by the appellants and came to the conclusion that in making the impugned modifications respondent 2 and respondent 1 had acted beyond their jurisdiction. The learned Judge, therefore, set aside the modifications made and allowed the appellants' petition.

Against this order respondent 2 preferred an appeal, being Appeal No. 122 of 1954, before the Court of Appeal in the Bombay High Court. The appellate Court reversed the decision of Coyajee, J., and held that the action of respondents 2 and 1 in making the modifications in question was justified by the provisions of the Act. In the result the petition filed by the appellants was dismissed. It is against this decision that the present appeal has been preferred by the appellants and the short question which it raises for our decision is : whether, under the provisions of the Act, it was competent to respondents 2 and 1 to make the impugned modifications in the draft standing orders submitted by the appellants for certification under the Act?

The Act has been passed because it was thought ;

> " expedient to require employers in industrial establishment to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them."

Standing Orders are defined by section 2 (*g*) of the Act to mean rules relating to matters set out in the Schedule. The Schedule sets out 11 matters in respect of which standing orders are required to be made by the employers. Mr. Kolah, for the appellants, contends that the main object of the Act is to require the employers to provide for conditions of service in respect of all the matters covered by the Schedule, and, according to him the jurisdiction of respondent 2 under the Act as it then stood is confined only to see that standing orders are made in respect of all the items specified in the Schedule. In this connection Mr. Kolah has strongly relied on the provision of section 4 which then laid down *inter alia* that :

> " it shall not be the function of the certifying officer or the appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing order ".

The argument is that the Act expressly prohibits respondent 2 or respondent 1 from enquiring whether any of the provisions made in the draft standing orders are fair or reasonable, and it is urged that, in making the modifications in question, in substance respondent 2 has embarked upon an enquiry about the reasonableness or fairness of the relevant conditions included in the draft. Thus presented the argument is no doubt attractive ; but there are some other provisions in the Act

which show that the argument based on the said provision of section 4 cannot succeed. It is, therefore, necessary to consider the other provisions which are material. Before we do so, we would like to add that by a subsequent amendment made in 1956 section 4 now provides that it shall be the function of the certifying officer or the appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders. In other words, what was expressly excluded from the jurisdiction of the authorities under the Act has now been clearly made their duty, and so the argument based upon the provision as it stood in 1946, is after the amendment of 1956, purely academic.

Section 3 of the Act requires the employer to submit draft standing orders. Section 3 (2) provides that in the draft thus submitted provision shall be made for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable, in conformity with such model. It is common ground that model standing orders have been prescribed in the present case, and so it follows that under section 3, sub-section (2) the draft submitted by the appellants had to be in conformity with the model standing orders so far as was practicable. In other words, the effect of section 3, sub-section (2) is that, unless it is shown that it is impracticable to do so, the appellants' draft had to conform to the model. This position cannot be disputed. Then, the next relevant provision of the Act is contained in section 4 which provides that standing orders shall be certifiable under this Act if (*a*) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and (*b*) the standing orders are otherwise in conformity with the provisions of this Act. The rest of the provisions of section 4 has already been cited and considered by us. Having thus provided for the tests which have to be satisfied before a draft submitted by the employer can be treated as certifiable, section 5 provides for the procedure of the proceedings which are taken before the certifying officer. Section 5 (2) lays down that after notice is given to the parties concerned the certifying officer shall decide whether or not any modification of, or addition to, the draft submitted by the employer is necessary to render the draft standing orders certifiable under the Act, and shall make an order in writing accordingly. Sub-section (3) of section 5 then provides for certifying the draft after making modifications, if any, under sub-section (2). There is one more section to which reference may be made. Section 15 (2) (*b*) provides that the rules which the appropriate government may make under the Act may set out model standing orders for the purposes of this Act. The cumulative effect of these provisions is that the certifying officer has to be satisfied that the draft standing orders deal with every matter set out in the Schedule and are otherwise in conformity with the provisions of the Act. This latter requirement necessarily imports the consideration specified in section 3, sub-section (2), that is to say, the draft standing order must be in conformity with the model standing order which is provided under section 15 (2) (*b*) for the purposes of the Act, and, as we have already seen, unless it is shown that it would be impracticable to do so, the draft standing order must be in conformity with the model standing order. It is quite true that this requirement does not mean that the draft standing order must be in identical words but it does mean that in substance it must conform to the model prescribed by the appropriate government.

The question which then arises is : was it or was it not open to respondent 2 to consider whether the draft submitted by the appellants should not conform to the model standing order in respect of the topics with which we are concerned in the present appeal? The answer to this question must obviously be in the affirmative. It was not only open to respondent 2 to enquire into the matter but it was clearly his duty to do so before holding that the draft orders were certifiable under section 4. Now such an enquiry necessarily involves the consideration of the question as to whether it would be practicable to insist upon conformity with the model standing order in regard to the matters in dispute. If respondent 2 was satisfied that it would be practicable to insist upon such conformity it would be within his competence to make the suitable modifications in the draft. If, on the other hand,

he took the view that it would not be practicable to insist upon such conformity he would, despite the disparity between the model and the draft, treat the draft as certifiable. In the present case respondent 2 as well as respondent 1 have held that it was practicable to insist upon conformity with the model standing order in regard to the matters in dispute; and so they have made suitable modifications. Having regard to the relevant provisions which we have just considered, it seems difficult to accept the plea that in making the modifications in question respondent 2 and respondent 1 have exceeded their jurisdiction. It is important to make a distinction between considerations of fairness or reasonableness which are excluded from the purview of the enquiry before respondent 2 and respondent 1 from considerations of practicability which are necessarily imported in such an enquiry. The line separating the one from the other may be thin but nevertheless it is a firm and existing line which it statutorily recognised in the respective provisions of the Act. Respondent 2 may not modify the draft on the ground that its provisions are unfair or unreasonable but he can and must modify the draft in matters covered by the model standing order if he is satisfied that conformity with such model standing order is practicable in the circumstances of the case. In our opinion, therefore, the High Court was right in holding that the authorities under the Act had acted within their jurisdiction in making the impugned modifications.

We may now refer to the decisions to which our attention was invited by Mr. Kolah. In *Guest, Keen, Williams (Private) Ltd.* v. *Sterling (P. J.) and others*[1], this Court had occasion to consider the effect of a part of the provision contained in section 4 of the Act as it stood before its amendment in 1956. It is, however, clear that in that case the point raised for our decision now did not fall to be considered. In *Electric Workers Union* v. *The U. P. Electric Supply Co.*[2], Mr. Justice Wanchoo, who was acting as the appellate authority under the Act, appears to have held that the provision contained in section 3 (2) had nothing to do with the power of the certifying officer to substitute the model for the draft. According to the learned Judge the said provision was intended merely to help and guide the employers as to how they should frame their draft standing orders. This decision apparently supports the argument that the certifying officer cannot make any changes in the provisions of the draft where those provisions are clear on the ground that they are not reasonable and fair and that other provisions which may have been provided in the model standing orders should be substituted for them. If, in making these observations, it was intended to decide that, before certifying the draft standing orders submitted by the employer, the certifying officer cannot enquire and decide whether it would be practicable or not to make the provisions in the draft conform to the model standing orders, with respect, we would hold that the said decision is inconsistent with the true effect of the relevant provisions of the Act. We may incidentally add that the observations made by Wanchoo, J., in that case have not been approved by the Allahabad High Court in *Jiwan Mal & Co.* v. *Secretary, Kanpur Loha Mills Karamchari Union and others*[3]. In *Mysore Kirloskar Employees' Association* v. *Industrial Tribunal, Bangalore and another*[4], the Mysore High Court has considered this question and it appears to have concurred more with the view expressed by the Bombay High Court which is the subject-matter of the present appeal than with the observations of Wanchoo, J.

There is one more point to which reference must be made. Mr. Kolah attempted to argue before us that, even if the authorities under the Act had jurisdiction to deal with the matter and examine whether or not it was practicable to insist upon conformity with the model standing orders, the modifications made by them on the merits are impracticable. We have not allowed Mr Kolah to urge this contention before us because such a plea was not raised by the appellants in their petition for a writ before the Bombay High Court, and it would not be open to them to raise it for the first time before us. Besides, in a petition for a writ of *certiorari* it

1. 1960 S.C.J. 281 : (1959) 2 L.L.J. 405 : A.I.R. 1959 S.C. 1279 (S.C.).
2. A.I.R. 1949 A. 504.
3. A.I.R. 1955 All. 581.
4. (1959) 1 L.L.J. 531.

would normally not be open to the appellants to challenge the merits of the findings made by the authorities under the Act.

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

Piyare Lal Adishwar Lal .. *Appellants**

v.

The Commissioner of Income-tax, Delhi .. *Respondent.*

Income-tax Act (XI of 1922), sections 7 and 10—Kartha of Hindu joint family employed as Treasurer in a bank—Kartha furnishing joint family property as security—Income received whether individual income of Kartha or the income of the joint family—Emoluments received by the Kartha if amounted to profits and gains of business.

[Tests of relationship of master and servant and employer and independent contract or considered and held that the treasurer in the instant case was a servant of the bank.]

Treasurership of a bank is an employment of responsibility, trust and fidelity and mere ability to furnish a substantial security is not the sole or main reason for being appointed as a Treasurer. The Treasurer's experience as an overseer of the Bank and his being appointed on his applying for the post are indicative of personal fitness for it.

There is nothing to show that the Treasurer had received any particular trainng at the expense of the family funds or his appointment was the result of any expenditure with detriment to the family property.

It has not been so far held that the mere fact of giving joint family property in security for the good conduct of a member of the family employed in a post of trust is sufficient to make the emoluments of the post joint family property, because of any detriment to the family property or risk of loss.

The emoluments received by the Treasurer (Kartha) were in the nature of salary and therefore assessable under section 7 of the Income-tax Act and not under section 10 of the Act as profits and gains of business and the salary was the income of the individual (Treasurer) and not the income of the joint family.

Appeal from the Judgment and Order, dated the 12th May, 1955, of the Punjab High Court in Civil Reference No. 17 of 1953.

A. V. Viswanatha Sastri, Senior Advocate (*S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellants.

C. K. Daphtary, Solicitor-General of India, (*R. Ganapathy Iyer* and *D. Gupta*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the judgment and order of the High Court of Punjab made on a reference under section 66 (1) of the Indian Income-tax Act which was answered in favour of the Commissioner of Income-tax. The appellant is the assessee—a Hindu undivided family—with Sheel Chandra as its Karta and the respondent is the Commissioner of Income-tax.

The appeal relates to the assessment year 1951-52. The appellant, a Hindu undivided family, consisted of Sheel Chandra and his younger brother. Their father Adishwar Lal, upto his death on 16th April, 1950, was the Treasurer of several branches of the Central Bank of India (which in the judgment will be referred to as the Bank). During his father's lifetime Sheel Chandra was employed as an Overseer in the Bank on a salary of Rs. 400 a month. Sheel Chandra was appointed Treasurer of the Bank at Delhi and sixteen other branches of the Bank. As Treasurer he furnished security to the Bank of certain properties of the Hindu undivided family, which consisted of title deeds of immovable properties in Chandni Chowk,

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* C.A. No. 123 of 1957. 26th April, 1960.

Delhi and Government of India securities of the value of Rs. 75,000. The Hindu undivided family owns considerable property. Its income from house property alone is Rs. 50,000 per annum and it owns stocks, shares and Government securities also of considerable value. As Treasurer Sheel Chandra received in the year of account from the Bank a sum of Rs. 23,286 and the question for decision is whether this sum is the individual income of Sheel Chandra as salary or it is part of the income of the Hindu undivided family. The Income-tax Authorities held this sum to be the latter and taxed it as such. The Income-tax Appellate Tribunal in upholding this view held that on a proper construction of the written agreement between Sheel Chandra and the Bank, the emoluments received by the Treasurer were profits and gains of business and it further held that as the security furnished by Sheel Chandra came out of the joint family properties, the emoluments could not be said to have been earned without detriment to the family property and therefore were part of the income of the Hindu undivided family. At the instance of the appellant the Tribunal referred under section 66 (1) the following two questions to the High Court :—

(1) "Whether in the facts and circumstances of the case and on a true construction of the agreement between the Central Bank of India and Sheel Chandra the salary and other emoluments received by Sheel Chandra as Treasurer of the said Bank are assessable under the head 'salary' or under the head 'Profits and gains of business' ".

(2) "Whether in the facts and circumstances of the case, Sheel Chandra's emoluments as Treasurer of the Central Bank of India, Ltd., were rightly assessed in the hands of the Hindu undivided family of which he is the Karta ".

Both questions were answered against the appellant.

On a consideration of the various clauses of the agreement between Sheel Chandra and the Bank, the High Court held that the relationship between them was not one of master and servant but that of an employer and independent contractor and therefore the emoluments received by Sheel Chandra as Treasurer were not salary but profits and gains of business. As to the second question the High Court was of the opinion that the emoluments were the income of the Hindu undivided family because Sheel Chandra was not appointed Treasurer on account of any personal qualification but he was appointed because (*a*) his father was a Treasurer of the Bank before him and (*b*) he had furnished substantial security which was part of the property of the Hindu undivided family. Against this judgment and order the appellant has come in appeal to this Court.

The nature of the employment of Sheel Chandra has to be gathered from the agreement, dated 19th September, 1950, between him and the Bank. It shows that on his application for appointment as a Treasurer at Delhi and sixteen other branches of the Bank, the Bank appointed him Treasurer for those branches and he could, by mutual agreement, be appointed at other branches in the Punjab, Uttar Pradesh and Rajasthan. The appointment took effect from 16th April, 1950, Sheel Chandra undertook to perform the duties and be responsible as Treasurer of the various branches of the Bank and was required to engage and employ subordinate staff called the Cash Department Staff such as Head Cashiers, Cashiers, Potdars, Guaranteed Peons, Godown Keepers, Assistant Godown Keepers, Chowkidars and Clerks and other persons necessary for the efficient working of the said offices. He had the power to "control, dismiss and change" this Staff at his pleasure but he could not engage or transfer any member of the Staff except with the approval of the Bank and had to dismiss any such member if so required by the Managing Director of the Bank or Agent of the Office.

The Treasurer and the Cash Department Staff were to do and be responsible for all work in connection with receipts and payments of monies and had to do such other work as was customarily done by cashiers and shroffs of Banks. The Treasurer was also responsible for the correctness and genuineness of all hundies and cheques bearing signatures and endorsements in vernacular and for genuineness of all signatures and writings in any language or character or any securities, voucher deeds, documents and writings which the Treasurer or the Cash Depart-

ment Staff dealt with and in case of any loss or damage arising out of any forged signatures and endorsements on any document accepted or dealt with by the Cash Department Staff as correct and genuine, the Treasurer was responsible to make good the loss. He was also required, when asked by the Bank, to engage the necessary staff, to look after the goods pledged with the Bank and he was responsible for the good conduct of such staff. It was also his duty to make enquiries and report upon the identity, credit and solvency of persons dealing with the Bank and was liable for any loss arising out of any wilful misrepresentaton or negligence in the enquiry or report made by him or his representative in any matter arising in the course of employment. He or his representative were also required, when asked, to give reliable information in regard to hundi business but he was not responsible for any damage or loss arising therefrom. He also undertook when required by the Officers of the Bank to value and give correct certificate in regard to the genuineness, fineness and weight of bullion and gold ornaments and other valuables pledged with the Bank. He was responsible for any loss to the Bank in case of any wilful misrepresentation or negligence in regard to this branch of his duty. He further undertook to supply to the Bank as many persons as were required at the various branches of the Bank which the Bank opened in future. He undertook responsibility for the safe custody of the monies and ornaments and other valuables kept with or pledged wih the Bank as also for the bills of exchange, promissory notes, hundies or other securities. Besides this he was required to satisfy the Agent or the Manager of the branch that all the monies of the Bank and other valuable securities which had not been duly used and accounted for were intact and in their proper places.

Sheel Chandra was paid a salary of Rs. 1,750 per mensem for all the branches he was employed in. Besides this he was paid certain sums of money for guaranteeing the conduct of Godown Keepers, Assistant Godown Keepers and Chowkidars supplied by him. If the branches or out-agencies were increased he was to receive such increase in salary as might mutually be agreed upon. On the closing of any branch there was to be a corresponding reduction in the remuneration. The members of the Cash Department Staff were to be paid travelling allowance according to the rules of the Bank. In addition to the remuneration abovementioned the Treasurer or his authorised representative when visiting different branches were to get actual railway fare. The various members of the Cash Department Staff were to be paid their salary directly by the Bank but the Bank was not boundto pay more than the scale laid down by it. The permanent members of the Cash Department Staff were to get the usual increments and benefit of Provident Fund and travelling allowance in accordance with the rules of the Bank. The Treasurer was required to engage members of the Cash Staff on salaries laid down by the Bank and if he paid anything more than the usual Bank scale he had to pay it himself. The Treasurer was also entitled to nominate and appoint a representative to carry on the duties undertaken by him at the various offices of the Bank but these appointments were subject to the approval of the Bank.

The Treasurer was responsible for the acts of omission and commission and for neglect and default of his representatives and for each and every member of the Cash Department Staff. There are various clauses in the agreement requiring the Treasurer or his representative to perform their duties efficiently, honestly and in a proper manner. The Treasurer and the Cash Department Staff were under the control of the Bank. They were required to make entries in the books of account which were furnished by the Bank giving full particulars of all monies received and paid by them and in such manner as the Agent of the Bank might from time to time direct in writing. The Treasurer had to carry out his duties faithfully and any communication made by the Bank to any member of the Cash Department Staff was to be considered as a communication made to the Treasurer himself and he was bound to take notice of it. The agreement could be terminated by three calendar months' notice in writing by either side but in the event of any breach of any condition of the agreement by the Treasurer his services could be terminated forthwith; but his liability was to continue. There was also an arbitration clause

Counsel for the appellant contended that the varous provisions of the agreement showed that Sheel Chandra was a servant of the Bank and not an independent contractor. He laid particular emphasis on the fact that he was appointed a Treasurer on a monthly salary and his services could be terminated forthwith in certain circumstances. Besides this he was to carry out his duties as directed by the Bank and was to discharge his duties faithfully and if in the discharge of his duties he caused any loss to the Bank he was liable to make good the loss. These factors, according to him, showed that he was not an independent contractor or an agent of the Bank but was a salaried servant. The contention on behalf of the respondent on the other hand was that the agreement showed that Sheel Chandra was carrying on a business in that he was supplying cashiers and other members of the Cash Department Staff for a monetary consideration. He guaranteed their fidelity which was an insurance undertaken by him. He was to get certain sums of money for supplying each member of certain classes of servants to the Bank and the agreement between the Bank and Sheel Chandra could be terminated by notice and there was an arbitration clause and he was not required to serve personally.

Undoubtedly there are some terms in the agreement which are unusual as ordinary agreements of service go but in the case of an agreement between a Bank and a Treasurer they are not so unusual. There was an agreement with very similar clauses in *Shivanandan Sharma* v. *The Punjab National Bank, Ltd.*[1] and it was held to be an agreement of service and not of agency.

Now, the duties of Sheel Chandra under the agreement are such as are peculiar to the employment of Treasurers. It is true that as Treasurer, Sheel Chandra had also undertaken to indemnify the Bank not only for his own default but also for the default of the members of the Cash Department Staff. But Banks have to deal with monies, valuable securities gold and other valuables and must necessarily employ servants whose honesty is guaranteed and it is necessary for the Bank to have some one in its employment who can perform these duties in a responsible manner and be answerable to the Bank for negligence and default in the performance of this class of work. In the very nature of things one man cannot do all this work, not even at one branch, what to say of several branches ; other people have therefore to be employed and although the persons employed in the Cash Department are servants of the Bank they do the work which Treasurers ordinarily and customarily do and consequently the Treasurer is made responsible for any damage which the Bank suffers due to the default of the Treasurer or of those employed to do the work of the Cash Department.

It is difficult to lay down any one test to distinguish the relationship of master and servant from that of an employer and independent contractor. In many cases the test laid down is that in the case of master and servant the master can order or require what is to be done and how it is to be done but in the case of an independent contractor an employer can only say what is to be done but not how it shall be done. But this test also does not apply to all cases, *e.g.*, in the case of Ship's master, a chauffeur or a reporter of a newspaper. It was pointed out in *Cassidy* v. *Ministry of Health*[2] that in the case of contract of service

> "a man is employed as part of the business, and is work is done as an integral part of the business whereas under a contract for services the contractor is not integrated into the business but is only accessory to it".

In certain cases it has been laid down that the indicia of a contract of service are (*a*) the master's power of selection of the servant ; (*b*) the payment of wages or other remunerations; (*c*) the masters right to control the method of doing the work and (*d*) the master's right of suspension or dismissal ; *Short* v. *J. and Henderson, Ltd.*[3]. Bhagwati, J., in *Dharangadhra Chemical Works, Ltd.* v. *State of Saurashtra*[4] said that in all cases the correct method of approach is whether having regard to the nature of work there was due control and supervision by the employer.

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1. (1955) 1 M.L.J. 247 : (1955) S.C.J. 407 : (1955) 1 S.C.R. 1427 (S.C.).
2. L.R. (1951) 2 K.B. 343, 352-3.
3. 62 T.L.R. 427, 429.
4. (1957) S.C.J. 208 : 1957 S.C.R. 152, 160.

We have given above the duties of the Treasurer in the present case, his obligations and the manner of control exercised over him and the staff employed by him to carry out the work of the Cash Department of the Bank. It is no doubt true that the Treasurer guaranteed his fidelity, good faith and honesty of the persons who were employed in the Cash Department of the Bank but that was a part of the duty that he undertook and that is peculiar to the very nature of his employment. Applying the test which was laid down by Bhagwati, J., in *Dharangadhra Chemical Works, Ltd.* v. *State of Saurashtra*[1] that having regard to the nature of the work whether there was due control and supervision of the Bank over the Treasurer, the Treasurer in the instant case must be held to be a servant of the Bank. What we have to see is the effect of the agreement as a whole and taking the various clauses together it must be held that Sheel Chandra, the Treasurer, was a servant of the Bank. In view of this it is not necessary to discuss in detail the various cases that were cited at the Bar. *K. P. Bhargava* v. *The Commissioner of Income-tax, Uttar Pradesh*[2], was the case of a Treasurer of the Central Bank of India at Agra. There he was paid a salary of Rs. 100 and a commission for his work as a Guarantee Commission Agent but the terms of the contract were different and that was clearly a case of a Guarantee Commission Agency.

Lala Jeewan Lal v. *Commissioner of Income-tax*[3] was also a case of commission agency and in the peculiar circumstances of that case it was held to be business within section 2 (5) of the Excess Profits Tax Act. The assessee there was paid a commission of four annas per cent. on the value of the contracts secured by him. Subsequently the commission was increased to Re. 1 per cent. and for this extra commission he agreed to reimburse the mill in case of failure of a person purchasing through him to pay the price. Counsel for the respondent also relied on *Commissioner of Income-tax, West Bengal* v. *Kalu Bubu Lal Chand*[4] where the Managing Director's remuneration was held to be the income of a joint family to be assessed as such in its hands. That case is distinguishable. There the *karta* of a Hindu undivided family took over a business as a going concern and carried on the business till the company was incorporated. The shares in the name of karta and his brother were acquired with the funds of the joint family. The company was floated with the funds of the joint family and was financed by it and the remuneration received was credited in the books of the fam y. The office of the Managing Director itself was assignable. The Articles of Association provided that the *karta* or his assigns or successors in busness "whether under his name or any other style or firm" would be the Managing Director o the Company and he was to continue for life until removed because of fraud or dishonesty. Thus the acquisition of business, the floatation of the Company and the appointment of the Managing Director were inseparably linked together. The facts of that case were quite different from that of the present case which are akin to the facts in *Shivanandan Sharma* v. *Punjab National Bank, Ltd.*[5].

The next question for decision is whether the salary of Sheel Chandra as Treasurer of the Bank is assessable as part of the income of Hindu undivided family of which he is the karta or as his separate income. Both the Appellate Tribunal and the High Court were of the opinion that the emoluments as Treasurer were not acquired without any detriment and risk to the family properlty and therefore formed part of the income of the Hindu undivided family. Treasurership is an employment of responsibility, trust and fidelity and personal integrity and ability and mere ability to furnish a substantial security is not the sole or even the main reason for being appointed to such a responsible post in a Bank like the Central Bank of India. On the other hand his previous experience as an Overseer of the Bank and his being appointed on his applying for the post are indicative of personal fitness for it.

There is nothing to show that Sheel Chandra had received any particular training at the expense of the family funds or his appointment was the result of any outlay

1. (1957) S.C.J. 208 : 1957 S.C.R. 152, 160.
2. 26 I.T.R. 489.
3. 24 I.T.R. 217.
4. (1960) S.C.J. 311 : (1960) 1 M.L.J. (S.C.) 81 : (1960) 1 An. W.R. (S.C.) 81 : 37 I.T.R. 123.
5. 1955 S.C.J. 407 : (1955) 1 M.L.J. (S.C.) 247 : (1955) 1 S.C.R. 1427.

or expenditure of or detriment to the family property. But it was argued on behalf of the respondent that because he had lodged joint family property by way of security his earnings as Tresurer became a part of the income of the Hindu undivided family for the reason that the acquisition was not without risk to the family estate. He relied on *Gokul Chand* v. *Firm Hukum Chand Nath Mal*[1] and *Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lal Chand*[2]. In the former case a member of the joint family entered the Civil Service and that was made possible by the expenditue of family funds which enabled him to acquire the necessary qualifications and it was that fact which made his earnings part of the family income. The following passage in that judgment at p. 168 was emphasised :—

> " It may be said to be direct in the one case and remote in the other, but if risk of or detriment to family property is the point in both cases, there appears to be no such merit in " science ", recognised by the sages of the Hindu law, as would warrant the exclusion of gains of science as such from the category of partible acquisitions ".

Counsel particularly relied on the words 'risk of' and contended that by reason of the family property being given in security, the risk as understood in that judgment had arisen ; because, it became liable for any loss that might be incurred during the course of employment of Sheel Chandra. The word 'risk' in that judgment must be read in the context in which it was used. Family estate was used and expenditure was incurred for equipping one of its members to join the Indian Civil Service. It was in that connection that the words 'risk of' or 'detriment to' family property were used. The latter case, *Kalu Babu Lal Chand's case*[2], has already been discussed. The facts and circumstances of that case were different.

The cases which the Privy Council relied upon in *Gokul Chand's cases*[1] were all cases where joint family funds had been expended to fit a member of the joint family for the particular profession or avocation the income of which was the subject-matter of dispute but the respondents were not able to refer tc any decision in which it was held that the mere fact of giving joint family property in security for the good conduct of a member of the family employed in a post of trust was sufficient to make the emoluments of the post joint family property because of any detriment to family property or risk of loss. It has not been shown that in this case there was any detriment to the family property within the meaning of the term as used in decided cases.

In our opinion the judgment of the High Court was erroneous on both quesions which were referred to it and they should both have been decided in favour of the appellant.

The emoluments received by Sheel Chandra were in the nature of salary and therefore assessable under section 7 of the Income-tax Act and not under section 10 of the Act as profits and gains of business and the salary was the income of the individual, *i.e.*, Sheel Chandra and not the income of the Hindu undivided family.

We therefore allow this appeal and set aside the judgment and order of the High Court. The appellant will have its costs in this Court as well as in the High Court.

Appeal allowed.

[END OF VOLUME (1960) 2 M.L.J. (S.C.) Reports.]

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1. 40 M.L.J. 327 : L.R. 48 I.A. 162.
2. (1960) S.C.J. 311 : (1960) 1 M.L.J. (S.C.) 81 : (1960) 1 An. W.R. (S.C.) 81 : 37 I.T.R. 123.